List of Subjects in 40 CFR Part 35

State and local assistance.

Dated: November 17, 1994.

Robert Perciasepe,

Assistant Administrator for Water, Environmental Protection Agency.

For the reasons set out in this preamble, part 35, subpart P of title 40 of the Code of Federal Regulations is amended as follows:

PART 35—[AMENDED]

Subpart P—Financial Assistance for the National Estuary Program

1. The authority citation for Subpart P continues to read as follows:

Authority: Sec. 320 of the Clean Water Act, as amended (33 U.S.C. 1330).

2. In § 35.9065, paragraph (b) is removed, and paragraph (c) is redesignated as paragraph (b) and newly designated paragraph (b) introductory text is revised to read as follows:

§ 35.9065 Limitations.

(a) * * *

(b) *Elements of annual workplans.* Annual Work Plans to be prepared by estuary Management Conferences must be reviewed by the Regional Administrator before final ratification by the Management Conference and must include the following elements:

* * * * *

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November 29, 1994

Part V

Environmental Protection Agency

40 CFR Part 228
Ocean Dumping Regulations: Ocean Dumping Site Correction and Reorganization; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 228

[FRL–4885–2]

RIN 2040–AB63

Ocean Dumping Regulations: Ocean Dumping Site Correction and Reorganization

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency is revising the regulations containing the list of EPA designated ocean dumping sites. This rule reorganizes the way in which the sites are printed in the Code of Federal Regulations, eliminates listings of expired or terminated sites, eliminates listings of sites which lie landward of the baseline of the territorial sea, corrects technical errors in the list of ocean dumping sites, and makes conforming technical changes to the regulations. These changes are not substantive in nature, and are needed to improve the clarity and accuracy of the list of ocean dumping sites. In addition to these clarifying changes, this rule de-designates the Cellar Dirt Site in the New York Bight and the Newburyport, MA, dredged material site. Those sites are no longer being used and there is no demonstrable need for their use in the future.

EFFECTIVE DATE: December 29, 1994.

ADDRESSES: Send written comments on the final rule to the Ocean Dumping Comment Clerk, Water Docket, MC 4101, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Susan Hitch at (202) 260–9178, Office of Wetlands, Oceans, and Watersheds (4504F), 401 M Street SW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

Background

Title I of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1401 et seq., (hereinafter referred to as "the Act" or "the MPRSA") regulates the ocean dumping and transportation of material for purposes of ocean dumping. Environmental Protection Agency (EPA) regulations implementing the Act are set forth at 40 CFR parts 220 through 229.

With few exceptions, the MPRSA prohibits the transportation of material from the United States for the purpose of ocean dumping except as may be authorized by a permit issued under the MPRSA. The Act divides permitting responsibility between EPA and the US Army Corps of Engineers (COE). Under section 102 of the Act, EPA is assigned permitting authority for non-dredged material. For dredged material, section 103 of the Act assigns permitting responsibility to the COE, subject to EPA review and approval.

The Act also provides that EPA may designate recommended times and sites for ocean dumping (MPRSA section 102(c)), and 103 of the Act further provides that the COE is to use such EPA designated sites to the extent feasible. Where use of an EPA designated site is not feasible, the COE may select a disposal site as part of an MPRSA permitting action. EPA's ocean dumping regulations (40 CFR 228.4(b)) provide that the designation of an ocean dumping site is accomplished by promulgation in part 228 specifying the site.

Today's rule makes a number of changes with regard to the organization and contents of the list of ocean dumping sites as compared to the list published in the most recent (1992) Code of Federal Regulations (CFR). Proposal of these changes appeared on June 9, 1993, in 58 FR 32322. The preamble to that proposal explained the basis for the changes and included a table (Table 1) detailing proposed changes as to individual sites. The organizational changes are intended to improve the clarity of the regulations and are not intended to make any substantive changes.

Today's rule also de-designates the Cellar Dirt Site in the New York Bight and the Newburyport, MA, dredged material site by omitting them from this list of sites. While this is a substantive change to the regulations, these sites are no longer being used and there is no demonstrable need for them in the future.

Changes from Proposed Rule

Only one public comment was received in response to the proposed rule, which corrected the second coordinate for the location of Sabine-Neches, TX, Dredged Material Site 1. The proposed coordinates were listed in the proposal as 29°26′11″N. and 93°41′11″N. The correct coordinates are 29°26′11″N., and 93°41′14″ This change has been made in today's final rule.

The Norfolk, VA, (58 FR 35884), the Massachusetts Bay, MA, (58 FR 42496), Fort Pierce, FL, (58 FR 46544), and San Francisco Deepwater, CA (59 FR 41243) dredged material sites received final designation subsequent to the June 1993 proposal. Because these sites are now finally designated, they have been included in the list of approved sites in today's final rule. Addition of these sites is not a substantive change, but merely reflects separate rulemaking that has taken place since the June 9, 1993 proposal.

Finally, subsequent to publication of the proposed rule, the coordinates for the Matagorda, TX, dredged material site were modified (58 FR 64498) to allow use of deeper draft dredging equipment. This change also is reflected in today's final rule.

In addition, some corrections to site coordinates and one depth measurement were made to confrom to previous **Federal Register** rulemaking. These changes are as follows:

1. Cape Arundel, ME
   Proposed: 43°18′02″ N., 70°27′09″ W.
   corrected to: 43°17′45″ N., 70°27′12″ W.
2. Absecon Inlet, NJ
   Proposed: 39°20′03″ N. corrected to: 39°20′30″ N.
3. Georgetown Harbor, SC
   Proposed 33°1′18″ N., corrected to 33°11′18″ N.
   Proposed 33°0′38″ N., corrected to 33°10′38″ N.
4. Pascagoula, MS
   Proposed depth 48 feet corrected to 46 feet.
5. Sabine-Neches, TX, Site 1
   Proposed 29°26′11″ N., 93°41′11″ W., corrected to 20°26′11″ N., 93°41′14″ W.

Compliance With Other Laws and Executive Orders

1. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to lead to a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely and materially effecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; and

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action"

under the terms of Executive Order 12866, and is therefore not subject to OMB review.

2. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, is intended to minimize the reporting and record keeping burden on the regulated community as well as minimize the cost of Federal information collection and dissemination. In general, the Act requires that information requests and record keeping requirements affecting 10 or more non-Federal respondents be approved by the Office of Management and Budget. Since today's rule would not establish or modify any information and record keeping requirements, it is not subject to the requirements of the Paperwork Reduction Act.

3. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, EPA must prepare a Regulatory Flexibility Analysis for regulations having a significant impact on a substantial number of small entities. The RFA recognizes three kinds of small entities and defines them as follows:

(1) Small governmental jurisdictions—any government of a district with a population of less than 50,000.

(2) Small business—any business which is independently owned and operated and not dominant in its field as defined by Small Business Administration regulations under section 3 of the Small Business Act.

(3) Small organization—any not-for-profit enterprise that is independently owned and operated and not dominant in its field.

The changes included in today's rule do not impose economic burdens. Accordingly, EPA has determined that today's rule would not have a significant impact on a substantial number of small entities and that a Regulatory Flexibility Analysis therefore is unnecessary.

List of Subjects in 40 CFR Part 228

Environmental protection, Water pollution control.

Dated: October 25, 1994.

Carol Browner,

Administrator, Environmental Protection Agency.

For the reasons set out in the preamble, part 228 of title 40 of the Code of Federal Regulations is amended as follows:

PART 228—[AMENDED]

1. The authority citation for part 228 continues to read as follows:

Authority: 33 U.S.C. 1412 and 1418.

§ 228.3 [Amended]

2. Section 228.3(b) is amended in the first sentence by revising the phrase "continuing use" to read "final".

§ 228.12 [Removed and Reserved]

3. Section 228.12 is removed and reserved.

4. Part 228 is amended by adding §§ 228.14 and 228.15 to read as follows:

§ 228.14 Dumping sites designated on an interim basis.

(a)(1) The sites identified in this section are approved for dumping the indicated materials on an interim basis pending completion of baseline or trend assessment surveys and final designation or termination of use. Unless otherwise specifically provided in the entry for a particular site, such interim use sites are available indefinitely pending completion of the present studies and determination of the need for the continuing use of these sites, the completion of any necessary studies, and evaluation of their suitability. Designation studies for particular sites within this group will begin as soon as feasible after the completion of nearby sites presently being studied. The sizes and use specifications are based on historical usage and do not necessarily meet the criteria stated in this part.

(2) Unless otherwise specifically noted, site management authority for each site set forth in this section is delegated to the EPA Regional office under which the site entry is listed.

(3) Unless otherwise specifically noted, all ocean dumping site coordinates are based upon the North American Datum of 1927.

(b) Region I Interim Dredged Material Sites.

(1) Cape Arundel, ME.

(i) *Location:* 43°17'45"N., 70°27'12"W. (500 yds. diameter).

(ii) [Reserved]

(c) Region I Interim Other Wastes Sites.

(1) No interim sites.

(2) [Reserved]

(d) Region II Interim Dredged Material Sites.

(1) No interim sites.

(2) [Reserved]

(e) Region II Interim Other Wastes Sites.

(1) Incineration of Wood, NY/NJ.

(i) *Location:* 40°00'00"N. to 40°04'20"N.; 73°41'00"W. to 73°38'10"W.

(ii) [Reserved]

(2) [Reserved]

(f) Region III Interim Dredged Material Sites.

(1) No interim sites.

(2) [Reserved]

(g) Region III Interim Other Wastes Sites.

(1) No interim sites.

(2) [Reserved]

(h) Region IV Interim Dredged Material Sites.

(1) Port Royal Harbor North, SC.

(i) *Location:* 32°10'11"N., 80°36'00"W.; 32°10'06"N., 80°36'35"W.; 32°08'38"N., 80°36'23"W.; 32°08'41"N., 80°35'49"W.

(ii) [Reserved]

(2) Port Royal Harbor South, SC.

(i) *Location:* 32°05'46"N., 80°35'30"W.; 32°05'42"N., 80°36'27"W.; 32°04'22"N., 80°36'16"W.; 32°04'27"N., 80°35'18"W.

(ii) [Reserved]

(3) Palm Beach Harbor West, FL.

(i) *Location:* 26°46'10"N., 80°02'00"W.; 26°45'54"N., 80°02'06"W.; 26°45'54"N., 80°02'13"W.; 26°46'10"N., 80°02'07"W.

(ii) [Reserved]

(4) Palm Beach Harbor East, FL.

(i) *Location:* 26°46'00"N., 79°58'55"W.; 26°46'00"N., 79°57'47"W.; 26°45'00"N., 79°57'47"W.; 26°45'00"N., 79°58'55"W.

(ii) [Reserved]

(5) Port Everglades Harbor, FL.

(i) *Location:* 26°07'00"N., 80°04'30"W., 26°07'00"N., 80°03'30"W.; 26°06'00"N., 80°03'30"W.; 26°06'00"N., 80°04'30"W

(ii) [Reserved]

(6) Miami Beach, FL.

(i) *Location:* 25°45'30"N., 80°03'54"W., 25°45'30"N., 80°02'50"W., 25°44'30"N., 80°02'50"W.; 25°44'30"N., 80°03'54"W

(ii) [Reserved]

(7) Charlotte Harbor, FL.

(i) *Location:* 26°37'36"N., 82°19'55"W., 26°37'36"N., 82°18'47"W.; 26°36'36"N., 82°18'47"W.; 26°36'36"N., 82°19'55"W

(ii) [Reserved]

(8) Port St. Joe South, FL.

(i) *Location:* 29°50.9'N., 85°29.9'W.; 29°51.3'N., 85°29.5'W.; 29°49.2'N., 85°28.2'W.; 29°49.0'N., 85°28.8'W.

(ii) [Reserved]

(9) Port St. Joe North, FL.

(i) *Location:* 29°53.9'N., 85°31.8'W.; 29°54.1'N., 85°31.3'W.; 29°52.2'N., 85°30.1'W.; 29°52.2'N., 85°30.8'W

(ii) [Reserved]

(10) Panama City, FL.

(i) *Location:* 30°07.1'N., 85°45.9'W., 30°07.2'N., 85°45.5'W.; 30°06.9'N., 85°45.1'W.; 30°06.7'N., 85°45.6'W

(ii) [Reserved]

(i) Region IV Interim Other Wastes Sites.

(1) No interim sites.
(2) [Reserved]
(j) Region VI Interim Dredged Material Sites.
(1) Mississippi River, Baton Rouge to the Gulf of Mexico, LA—South Pass.
(i) *Description and location*: Maintaince dredging disposal area 0.5 mile square, parallel to the channel and located on the west side. Beginning at 28°58'33"N. and 89°07'00"W., following channel centerline (azimuth 295°41') of the Gulf entrance channel to 28°58'24"N. and 89°06'30"W., thence to 28°57'54"N. and 89°06'42"W., thence to 28°58'06"N. and 89°07'18"W., thence to the point of beginning.
(ii) [Reserved]
(2) Mississippi River Outlets, Venice, LA—Tiger Pass.
(i) *Description and location*: Maintenance dredging disposal area 0.5 mile wide by 2.5 miles long, parallel and adjacent to the channel and located on the south side. Beginning at 29°08'24"W. and 89°25'35"N. following 270° azimuth to 29°08'24"W. and 89°28'05"N., thence to 29°07'54"W. and 89°28'05"N., thence to 29°07'54"W. and 89°25'35"N., thence to the point of beginning.
(ii) [Reserved]
(3) Waterway from Empire, LA to the Gulf of Mexico—Bar channel.
(i) *Description and location*: Maintenance dredging disposal area 0.5 mile wide by 1 mile long, parallel to the channel and located on the west side. Beginning at 29°15'06"N. and 89°36'30"W., following channel centerline (azimuth 11°08') of the gulf entrance channel to 29°14'30"N. and 89°36'36"W., thence to 29°14'36"N. and 89°36'48"W., thence to 29°15'12"N. and 89°36'42"W., thence to the point of beginning.
(ii) [Reserved]
(4) Bayou Lafourche and Lafourche—Jump Waterway, LA—Bell Pass.
(i) *Description and location*: Maintenance dredging disposal area 2,000 feet wide by 1.5 miles long, parallel to the channel and located on the west side. Beginning at 29°05'00"N. and 90°13'45"W., following Bell Pass centerline (azimuth 12°55') in the gulf entrance channel to 29°03'51"N., and 90°14'06"W., thence to 29°03'57"N. and 90°14'21"W., thence to 29°05'06"N. and 90°14'03"W., thence to the point of beginning.
(ii) [Reserved]
(5) Atchafalaya River—Morgan City to the Gulf of Mexico, LA and Atchafalaya River and Bayous Chene, Boeuf and Black, LA—Bar channel.
(i) *Description and location*: Maintenance dredging disposal area 0.5 mile wide by 12 miles long, parallel to the bar channel and located on the east side. Beginning at 29°20'50"N. and 91°24'03"W., following channel centerline (azimuth 37°57') of the gulf entrance channel to 29°11'35"N. and 91°32'10"W., thence to 29°11'21"N. and 91°31'37"W., thence to 29°20'36"N. and 91°23'27"W., thence to the point of beginning.
(ii) [Reserved]
(6) Mermentau River, LA, Disposal Area "A".
(i) *Description and location:* Maintenance dredging disposal area 0.5 mile wide and 1.5 miles long, parallel to the entrance channels in the Lower Mermentau River and in the Lower Mud Lake, both located on the west side: Beginning at 28°44'48"N. and 93°07'12"W., following channel centerline (azimuth 256°59') of the gulf entrance to 29°43'39"N. and 93°07'36"W., thence to 29°43'42"N. and 93°07'48"W., thence to 29°44'51"N. and 93°07'24"W., thence to the point of beginning.
(ii) [Reserved]
(7) Mermentau River, LA, Disposal Area "B".
(i) *Description and location:* Maintenance dredging disposal area 0.5 mile wide by 1.5 miles long, parallel to the entrance channels in the Lower Mermentau River in the Lower Mud Lake, both located on the west side: Beginning at 29°43'24"N. and 93°01'54"W., following channel centerline (azimuth 359°50') of the gulf centerline to 29°42'33"N. and 93°02'12"W., thence to 29°42'36"N. and 93°02'24"W., thence to 29°43'36"N. and 93°02'06"W., thence to the point of beginning.
(ii) [Reserved]
(8) Freshwater Bayou, LA—Bar channel.
(i) *Description and location*: Maintenance dredging disposal area 2,000 feet wide by 3.5 miles long, parallel to the channel and located on the west side. Beginning at 29°32'00"N. and 92°18'48"W., following channel centerline (azimuth 09°25') of the gulf entrance to 29°28'24"N. and 92°19'30"W., thence to 29°28'25"N. and 92°19'42"W., thence to 29°32'01"N. and 92°19'00"W., thence to the point of beginning.
(ii) [Reserved]
(k) Region VI Interim Other Wastes Sites.
(1) No interim sites.
(2) [Reserved]
(l) Region IX Interim Dredged Material Sites.
(1) Newport Beach, CA (LA–3).
(i) *Location*: 33°31'42"N., 117°54'48"W. (1,000 yd. radius).
(ii) [Reserved]
(2) Port Hueneme, CA (LA–1).
(i) *Location*: 34°05'00"N., 119°14'00"W. (1,000 yd. radius).
(ii) [Reserved]
(3) Crescent City Harbor, CA (SF–1).
(i) *Location*: 41°43'15"N., 124°12'10"W. (1,000 yd. diameter).
(ii) [Reserved]
(4) Noyo River, CA (SF–5).
(i) *Location*: 39°25'45"N., 123°49'42"W. (500 yd. diameter).
(ii) [Reserved]
(5) Guam—Apra Harbor.
(i) *Location*: 13°29'30"N., 144°34'30" E. (1,000 yd. radius)
(ii) [Reserved]
(m) Region IX Interim Other Wastes Sites.
(1) No interim sites.
(2) [Reserved]
(n) Region X Interim Dredged Material Sites.
(1) Rogue River Entrance, OR.
(i) *Location:* 42°24'16"N., 124°26'48"W.; 42°24'04"N., 124°26'35"W.; 42°23'40"N., 124°27'13"W.; 42°23'52"N., 124°27'26"W.
(ii) [Reserved]
(2) Port Orford, OR.
(i) *Location:* 42°44'08"N., 124°29'38"W.; 42°44'08"N., 124°29'28"W.; 42°43'52"N., 124°29'28"W.; 42°43'52"N., 124°29'38"W.
(ii) [Reserved]
(3) Umpqua River Entrance, OR.
(i) *Location:* 43°40'07"N., 124°14'18"W.; 43°40'07"N., 124°13'42"W.; 43°39'53"N., 124°13'42"W.; 43°39'53"N., 124°14'18"W.
(ii) [Reserved]
(4) Siuslaw River Entrance, OR.
(i) *Location:* 44°01'32"N., 124°09'37"W.; 44°01'22"N., 124°09'02"W.; 44°01'14"N., 124°09'07"W.; 44°01'24"N., 124°09'42"W.
(ii) [Reserved]
(5) Yaquina Bay and Harbor Entrance, OR.
(i) *Location:* 44°36'31"N., 124°06'4"W.; 44°36'31"N., 124°05'16"W.; 44°36'17"N., 124°05'16".; 44°36'17"N., 124°06'04"W.
(ii) [Reserved]
(6) Tillamook Bay Entrance, OR.
(i) *Location:* 45°3409N., 123°5937W.; 45°34'09"N., 123°58'45"W.; 45°33'55"N., 123°58'45"W.; 45°33'55"N., 123°59'37"W.
(ii) [Reserved]
(7) Willapa Bay, WA.
(i) *Location:* 46°44'00"N., 124°10'00"W.; 46°39'00"N., 124°09'00"W.
(ii) [Reserved]
(o) Region X Interim Other Wastes Sites.
(1) No interim sites.
(2) [Reserved]

§ 228.15 Dumping sites designated on a final basis.

(a)(1) The sites identified in this section are approved for dumping the

indicated materials. Designation of these sites was based on environmental studies conducted in accordance with the provisions of this part 228, and the sites listed in this section have been found to meet the site designation criteria of §§ 228.5 and 228.6.

(2) Unless otherwise specifically noted, site management authority for each site set forth in this section is delegated to the EPA Regional office under which the site entry is listed.

(3) Unless otherwise specifically noted, all ocean dumping site coordinates are based upon the North American Datum of 1927.

(b) Region I Final Dredged Material Sites.

(1) Portland, Maine, Dredged Material Disposal Site.

(i) *Location:* 43°33'36"N., 70°02'42"W.; 43°33'36"N., 70°01'18"W.; 43°34'36"N., 70°02'42"W.; 43°34'36"N., 70°01'18"W.

(ii) *Size:* One square nautical mile.

(iii) *Depth:* 50 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(2) Massachusetts Bay Disposal Site.

(i) *Location:* Center coordinates (NAD 1983) 42°25.1' north latitude, 70°35.0' west latitude.

(ii) *Size:* 2 nautical mile diameter.

(iii) *Depth:* Average 90 meters.

(iv) *Exclusive Use:* Dredged material.

(v) *Period of Use:* Continuing.

(vi) *Restriction:* Disposal shall be limited to dredged material which meets the requirements of the MPRSA and its accompanying regulations. Disposal-and-capping is prohibited at the MBDS until its efficacy can be effectively demonstrated.

(c) Region I Final Other Wastes Sites.

(1) No final sites.

(2) [Reserved]

(d) Region II Final Dredged Material Sites.

(1) Fire Island Inlet, Long Island, New York Dredged Material Disposal Site.

(i) *Location:* 40°36'49"N., 73°23'50"W.; 40°37'12"N., 73°21'30"W.; 40°36'41"N., 73°21'20"W.; 40°36'10"N., 73°23'40"W.

(ii) *Size:* Approximately 1.09 square nautical miles.

(iii) *Depth:* Ranges from 7 to 10 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Fire Island Inlet, Long Island, New York.

(2) Jones Inlet, Long Island, New York Dredged Material Disposal Site.

(i) *Location:* 40°3432N., 73°3914W.; 40°3432N., 73°3706W.; 40°3348N., 73°3706W.; 40°3348N., 73°3914W.

(ii) *Size:* Approximately 1.19 square nautical miles.

(iii) *Depth:* Ranges from 7 to 10 meters.

(iv) *Primary use:* Dredged material disposal.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Jones Island Inlet, Long Island, New York.

(3) East Rockaway Inlet, Long Island NY Dredged Material Disposal Site.

(i) *Location:* 40°34'36"N., 73°49'00"W.; 40°35'06"N., 73°47'06"W.; 40°34'10"N., 73°48'6"W.; 40°34'12"N., 73°47'17"W.

(ii) *Size:* Approximately 0.81 square nautical miles.

(iii) *Depth:* Ranges from 6 to 9 meters.

(iv) *Primary use:* Dredged material disposal.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from East Rockaway Inlet, Long Island, New York.

(4) Rockaway Inlet, Long Island, New York Dredged Material Disposal Site.

(i) *Location:* 40°32'30"N., 73°55'00"W.; 40°32'30"N., 73°54'00W"; 40°32'00"N., 73°54'00"W.; 40°32'00"N., 73°55'00"W.

(ii) *Size:* Approximately 0.38 square nautical miles.

(iii) *Depth:* Ranges from 8 to 11 meters.

(iv) *Primary use:* Dredged material disposal.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Rockaway Inlet, Long Island, New York.

(5) Shark River, New Jersey Dredged Material Disposal Site.

(i) *Location:* 40°12'48"N., 73°59'45"W.; 40°12'44"N., 73°59'06"W.; 40°11'36"N., 73°59'28"W.; 40°11'42"N., 74°00'12"W.

(ii) *Size:* Approximately 0.6 square nautical miles.

(iii) *Depth:* Approximately 12 meters.

(iv) *Primary use:* Dredged material disposal.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Shark River Inlet, New Jersey.

(6) New York Bight Dredged Material Disposal Site (Mud Dump).

(i) *Location:* 40°23'48"N., 73°51'28"W.; 40°21'48"N., 73°50'00"W.; 40°21'48"N., 73°51'28"W.; 40°23'48"N., 73°50'00"W.

(ii) *Size:* 2.2 square nautical miles.

(iii) *Depth:* Ranges from 16 to 29 meters.

(iv) *Use Restricted to Disposal of:* Dredged materials.

(v) *Period of Use:* Continuing use, subject to volumetric restriction as noted paragraph (d)(6)(vi) of this section.

(vi) *Restriction:* Disposal shall be limited to 100 million cubic yards of dredged materials generated in the Port of New York and New Jersey and nearby harbors. Dumping within the area described by the following coordinates shall be limited to projects determined by the Corps and EPA to demonstrate a specific need, such as research or final capping. 40°23'48"N., 73°51'28"W.; 40°23'23"N., 73°51'28"W.; 40°23'23"N., 73°51'06"W.; 40°23'48"N., 73°51'06"W. Dumping in the southeast quadrant of the site shall not be authorized except as part of a research project on capping.

(7) Manasquan, New Jersey Dredged Material Disposal Site.

(i) *Location:* 40°06'36"N., 74°01'34"W.; 40°06'19"N., 74°01'39"W.; 40°06'18"N., 74°01'53"W.; 40°06'41"N., 74°01'51"W.

(ii) *Size:* Approximately 0.11 square nautical miles.

(iii) *Depth:* Approximately 18 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Manasquan Inlet, New Jersey.

(8) Absecon Inlet, NJ Dredged Material Disposal Site.

(i) *Location:* 39°20'39"N., 74°18'43"W.; 39°20'30"N., 74°18'25"W.; 39°20'03"N., 74°18'43"W.; 39°20'12"N., 74°19'01"W.

(ii) *Size:* Approximately 0.28 square nautical miles.

(iii) *Depth:* Approximately 17 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Absecon Inlet, New Jersey.

(9) Cold Spring Inlet, NJ Dredged Material Disposal Site.

(i) *Location:* 38°55'52"N., 74°53'04"W.; 38°55'37"N., 74°52'55"W.; 38°55'23"N., 74°53'27"W.; 38°55'36"N., 74°53'36"W.

(ii) *Size:* Approximately 0.13 square nautical miles.

(iii) *Depth:* Approximately 9 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Cold Spring Inlet, New Jersey.

(10) San Juan Harbor, PR, Dredged Material Site.

(i) *Location:* 18°30'10"N., 66°09'31"W.; 18°30'10"N., 66°08'29"W.; 18°31'10"N., 66°08'29"W.; 18°31'10"N., 66°09'31"W.

(ii) *Size:* 0.98 square nautical mile.

(iii) *Depth:* Ranges from 200 to 400 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Port of San Juan, Puerto Rico, and coastal areas within 20 miles of said port entrance.

(11) Arecibo Harbor, PR Dredged Material Disposal Site.

(i) *Location:* 18°31'00" N., 66°43'47" W.; 18°31'00" N., 66°42' 45" W.; 18°30'00" N., 66°42'45" W.; 18°30'00" N., 66°43'47" W.

(ii) *Size:* Approximately 1 square nautical mile.

(iii) *Depth:* Ranges from 101 to 417 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Arecibo Harbor, PR.

(12) Mayaguez Harbor, PR Dredged Material Disposal Site.

(i) *Location:* 18°15'30" N., 67°16'13" W.; 18°15'30" N., 67°15'11" W.; 18°14'30" N., 67°15'11" W.; 18°14'30" N., 67°16'13" W.

(ii) *Size:* Approximately 1 square nautical mile.

(iii) *Depth:* Ranges from 351 to 384 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Mayaguez Harbor, PR.

(13) Ponce Harbor, PR Dredged Material Disposal Site.

(i) *Location:* 17°54'00" N., 66°37'43" W.; 17°54'00" N., 66°36'41" W.; 17°53'00" N., 66°36'41" W.; 17°53'00" N., 66°37'43" W.

(ii) *Size:* Approximately 1 square nautical mile.

(iii) *Depth:* Ranges from 329 to 457 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Ponce Harbor, PR.

(14) Yabucoa Harbor, PR Dredged Material Disposal Site.

(i) *Location:* 18°03'42" N., 65°42'49" W.; 18°03'42" N., 65°41'47" W.; 18°02'42" N., 65°41'47" W.; 18°02'42" N., 65°42'49" W.

(ii) *Size:* Approximately 1 square nautical mile.

(iii) *Depth:* Ranges from 549 to 914 meters.

(iv) *Primary Use:* Dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Yabucoa Harbor, PR.

(e) Region II Final Other Wastes Sites.

(1) No final sites.

(2) [Reserved]

(f) Region III Final Dredged Material Sites.

(1) Dam Neck, Virginia, Dredged Material Disposal Site.

(i) *Location:* 36°51'24.1" N., 75°54'41.4" W.; 36°51'24.1" N., 75°53'02.9" W.; 36°50'52.0" N., 75°52'49.0" W.; 36°46'27.4" N., 75°51'39.2" W.; 36°46'27.5" N., 75°54'19.0" W.; 36°50'05.0" N., 75°54'19.0" W.

(ii) *Size:* 8 square nautical miles.

(iii) *Depth:* Averages 11 meters.

(iv) *Primary Use:* Dredged Material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the mouth of Chesapeake Bay.

(2) Norfolk, VA, Dredged Material Disposal Site.

(i) *Location:* Center point: Latitude—36°59'00" N., Longitude—75°39'00" W.

(ii) *Size:* Circular with a radius of 7.4 kilometers (4 nautical miles).

(iii) *Depth:* Ranges from 13.1 to 26 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Site shall be limited to suitable dredged material which passed the criteria for ocean dumping.

(g) Region III Final Other Wastes Sites.

(1) No final sites.

(2) [Reserved].

(h) Region IV Final Dredged Material Sites.

(1) Morehead City, NC Dredged Material Disposal Site.

(i) *Location:* 34°38'30" N., 76°45'0" W.; 34°38'30" N., 76°41'42" W.; 34°38'09" N., 76°41'0" W.; 34°36'0" N., 76°41'0" W.; 34°36'0" N., 76°45'0" W.

(ii) *Size:* 8 square nautical miles.

(iii) *Depth:* Average 12.0 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Morehead City Harbor, North Carolina area. All material disposed must satisfy the requirements of the ocean dumping regulations.

(2) Wilmington, NC Dredged Material Disposal Site.

(i) *Location:* 33°49'30" N., 78°03'06" W.; 33°48'18" N., 78°01'39" W.; 33°47'19" N., 78°02'48" W.; 33°48'30" N., 78°04'16" W.

(ii) *Size:* 2.3 square nautical miles.

(iii) *Depth:* Averages 13 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to the dredged material from Wilmington Harbor area.

(3) Georgetown Harbor; Georgetown, South Carolina: Ocean Dredged Material Disposal Site.

(i) *Location:* 33°11'18" N., 79°07'20" W.; 33°11'18" N., 79°05'23" W.; 33°10'38" N., 79°05'24" W.; 33°10'38" N., 79°07'21" W.

(ii) *Size:* 1 square nautical mile.

(iii) *Depth:* 6 to 11 meter range.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to suitable dredged material from the greater Georgetown, South Carolina, area.

(4) Charleston, SC Dredged Material Disposal Site.

(i) *Location:* 32°40'27"N., 79°47'22"W.; 32°39'04"N., 79°44'25"W.; 32°38'07"N., 79°45'03"W.; 32°39'30"N., 79°48'00"W.

(ii) *Size:* 3 square nautical miles.

(iii) *Depth:* Averages 11 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Charleston Harbor area.

(5) Charleston, SC Harbor Deepening Project Dredged Material Disposal Site.

(i) *Location:* 32°38'06"N., 79°41'57"W.; 32°40'42"N., 79°47'30"W.; 32°39'04"N., 79°49'21"W.; 32°36'28"N., 79°43'48"W.

(ii) *Size:* 11.8 square nautical miles.

(iii) *Depth:* Averages 11 meters.

(iv) *Primary use:* Dredged material from the Charleston Harbor deepening project.

(v) *Period of use:* Not to exceed seven years from the initiation of the Charleston Harbor deepening project.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Charleston Harbor area. All dredged material, except entrance channel materials, shall be limited to that part of the site east of the line between coordinates 32°39'04"N., 79°44'25"W., and 32°37'24"N., 79°45'30"W., unless the materials can be shown by sufficient testing to contain 10% or less of fine material (grain size of less than 0.074 mm) by weight and shown to be suitable for ocean disposal.

(6) Savannah, GA Dredged Material Disposal Site.

(i) *Location:* 31°55'53"N., 80°44'20"W.; 31°57'55"N., 80°46'48"W.; 31°57'55"N., 80°44'20"W.; 31°55'53"N., 80°46'48"W.

(ii) *Size:* 4.26 square nautical miles.

(iii) *Depth:* Averages 11.4 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Savannah Harbor area.

(7) Brunswick Harbor, Brunswick, Georgia Ocean Dredged Material Disposal Site.

(i) *Location:* 31°02'35"N., 81°17'40"W.; 31°02'35"N., 81°16'30"W.; 31°00'30"N., 81°16'30"W.; 31°00'30"N., 81°17'42"W.

(ii) *Size:* Approximately 2 square nautical miles.
(iii) *Depth:* Average 9 meters.
(iv) *Primary use:* Dredged material.
(v) *Period of use:* Continuing use.
(vi) *Restrictions:* Disposal shall be limited to suitable dredged material from the greater Brunswick, Georgia, vicinity.

(8) Fernandina Beach, FL Dredged Material Disposal Site.

(i) *Location:* 30°33'00"N., 81°16'52"W.; 30°31'00"N., 81°16'52"W.; 30°31'00"N., 81°19'08"W.; 30°33'00"N., 81°19'08"W.

(ii) *Size:* Four square nautical miles.
(iii) *Depth:* Average 16 meters.
(iv) *Primary use:* Dredged material.
(v) *Period of use:* Continuing Use.
(vi) *Restriction:* Disposal shall be limited to dredged material which meets the criteria given in the Ocean Dumping Regulations in 40 CFR part 227.

(9) Jacksonville, FL Dredged Material Site.

(i) *Location:* 30°21'30"N., 81°18'34"W.; 30°21'30"N., 81°17'26"W.; 30°20'30"N., 81°17'26"W.; 30°20'30"N., 81°18'34"W.

(ii) *Size:* One square nautical mile.
(iii) *Depth:* Ranges from 12 to 16 meters.
(iv) *Primary use:* Dredged material.
(v) *Period of use:* Continuing use.
(vi) *Restriction:* Disposal shall be limited to dredged material from the Jacksonville, Florida, area.

(10) Canaveral Harbor, FL, Dredged Material Dumpsite.

(i) *Location:* 28°20'15"N., 80°31'11"W.; 28°18'51"N., 80°29'15"W.; 28°17'13"N., 80°30'53"W.; 28°18'36"N., 80°32'45"W.

Center coordinates: 28°18'44"N., 80°31'00"W. (NAD 27).

(ii) *Size:* 4 square nautical miles.
(iii) *Depth:* Range 47 to 55 feet.
(iv) *Primary Use:* Dredged material.
(v) *Period of Use:* Continuing use.
(vi) *Restriction:* Disposal shall be limited to suitable dredged material from the greater Canaveral, Florida, vicinity.

(11) Fort Pierce Harbor, FL, Fort Pierce, FL, Ocean Dredged material Disposal Site.

(i) *Location:* 27°28'30"N., 80°12'33"W; 27°28'30"N., 80°11'27"W; 27°27'30"N., 80°11'27"W; 27°27'30"N., 80°12'33"W.

(ii) *Size:* 1 square nautical mile.
(iii) *Depth:* Average range 40 to 54 feet.
(iv) *Primary Use:* Dredged material.
(v) *Period of Use:* Continuing use.
(vi) *Restrictions:* Disposal shall be limited to suitable dredged material from the greater Fort Pierce Harbor vicinity All dredged material consisting of greater than 10% fine grained material (grain size of less than 0.047mm) by weight shall be limited to that part of the site east of 80°12'00"W. and south of 27°27'20"N.

(12) Pensacola Nearshore, FL Dredged Material Disposal Site.

(i) *Location:* 30°17'24"N., 87°18'30"W.; 30°17'00"N., 87°19'50"W.; 30°15'36"N., 87°17'48"W.; 30°15'15"N., 87°19'18"W.

(ii) *Size:* 2.48 square nautical miles.
(iii) *Depth:* Averages 11 meters.
(iv) *Primary use:* Dredged material.
(v) *Period of use:* Continuing use.
(vi) *Restriction:* Disposal shall be limited to dredged materials which are shown to be predominantly sand (defined by a median grain size greater than 0.125 mm and a composition of less than 10% fines) and meet the Ocean Dumping Criteria.

(13) Pensacola, Florida Ocean Dredged Material Disposal Site, i.e. the Pensacola (Offshore) Ocean Dredged Material Disposal Site.

(i) *Location:* 30°08'50"N., 87°19'30"W.; 30°08'50"N., 87°16'30"W.; 30°07'05"N., 87°16'30"W.; 30°07'05"N., 87°19'30"W.

(ii) *Size:* Approximately 6 square statute miles.
(iii) *Depth:* Ranges from 65 to 80 feet.
(iv) *Primary Use:* Dredged material.
(v) *Period of Use:* Continuing use.
(vi) *Restrictions:* Disposal is restricted to predominantly fine-grained dredged material from the greater Pensacola, Florida area that meets the Ocean Dumping Criteria but is not suitable for beach nourishment or disposal at the existing EPA designated Pensacola (Nearshore) ODMDS (§ 228.15(h)(11)). The Pensacola (Nearshore) ODMDS is restricted to suitable dredged material with a median grain size of > 0.125 mm and a composition of < 10% fines.

(14) Mobile, Alabama Dredged Material Disposal Site.

(i) *Location:* 30°10'00"N., 88°07'42"W., 30°10'24"N., 88°05'12"W.; 30°09'24"N., 88°04'42"W.; 30°08'30"N., 88°05'12"W.; 30°08'30"N., 88°08'12"W.

(ii) *Size:* 4.8 square nautical miles.
(iii) *Depth:* Average 14 meters.
(iv) *Primary use:* Dredged material.
(v) *Period of use:* Continuing use.
(vi) *Restriction:* Disposal shall be limited to dredged materials which meet the Ocean Dumping Criteria.

(15) Pascagoula, MS, Ocean Dredged Material Dumpsite.

(i) *Location:* 30°12'06"N., 88°44'30"W.; 30°11'42"N., 88°33'24"W.; 30°08'30"N., 88°37'00"W.; and 30°08'18"N., 88°41'54"W.

Center coordinates: 30°10'09"N., 88°39'12"W.

(ii) *Size:* 18.5 square nautical miles.
(iii) *Depth:* Average 46 feet, range 38–52 feet.
(iv) *Primary Use:* Dredged material.
(v) *Period of Use:* Continuing use.
(vi) *Restriction:* Disposal shall be limited to suitable material from the Mississippi Sound and vicinity.

(16) Gulfport, Mississippi Dredged Material Disposal Site—Eastern Site

(i) *Location:* 30°11'10"N., 88°58'24"W.; 30°11'12"N., 88°57'30"W.; 30°07'36"N., 88°54'24"W.; 30°07'24"N., 88°54'48"W.

(ii) *Size:* 2.47 square nautical miles.
(iii) *Depth:* 9.1 meters.
(iv) *Primary use:* Dredged material.
(v) *Period of use:* Continuing use.
(vi) *Restriction:* Disposal shall be limited to materials which meet the Ocean Dumping Criteria.

(17) Gulfport, MS Dredged Material Disposal Site—Western Site.

(i) *Location:* 30°12'00"N., 89°00'30"W., 30°12'00"N., 88°59'30"W.; 30°11'00"N., 89°00'00"W.; 30°07'00"N., 88°56'30"W.; 30°06'36"N., 88°57'00"W.; 30°10'30"N , 89°00'36"W.

(ii) *Size:* 5.2 square nautical miles.
(iii) *Depth:* 8.2 meters.
(iv) *Primary use:* Dredged material.
(v) *Period of use:* Continuing use.
(vi) Disposal shall be limited to dredged material which meets the Ocean Dumping Criteria.

(i) Region IV Final Other Wastes Sites.
(1) No final sites.
(2) [Reserved].

(j) Region VI Final Dredged Material Sites.

(1) Mississippi River Gulf Outlet, LA.

(i) *Location:* 29°32'35"N., 89°12'38"W.; 29°29'21"N., 89°08'00"W.; 29°24'32"N., 88°59'23"W.; 29°24'28"N., 88°59'39"W., 29°28'59"N., 89°08'19"W.; 29°32'15"N., 89°12'57"W.; thence to point of beginning.

(ii) *Size:* 6.03 square nautical miles.
(iii) *Depth:* Ranges from 20 to 40 feet.
(iv) *Primary use:* Dredged material.
(v) *Period of use:* Continuing use.
(vi) *Restrictions:* Disposal shall be limited to dredged material from the vicinity of Mississippi River Gulf Outlet.

(2) Southwest Pass—Mississippi River, LA.

(i) *Location:* 28°54'12"N., 89°27'15"W.; 28°54'12"N., 89°26'00"W.; 28°51'00"N., 89°27'15"W., 28°51'00"N., 89°26'00"W

(ii) *Size:* 3.44 square nautical miles.
(iii) *Depth:* Ranges from 2.7 to 32.2 meters.
(iv) *Primary use:* Dredged material.
(v) *Period of Use:* Continuing use.
(vi) *Restrictions:* Disposal shall be limited to dredged material from the vicinity of the Southwest Pass Channel.

(3) Barataria Bay Waterway, LA.

(i) *Location:* 29°16'10"N., 89°56'20"W 29°14'19"N., 89°53'16"W.; 29°14'00"N., 89°53'36"W.; 29°16'29"N., 89°55'59"W.

(ii) *Size:* 1.4 square nautical miles

(iii) *Depth*: Ranges from 8–20 feet.
(iv) *Primary Use*: Dredged material.
(v) *Period of Use*: Continuing use.
(vi) *Restriction*: Disposal shall be limited to dredged material from the vicinity of Barataria Bay Waterway.

(4) Houma Navigation Canal, Louisiana.

(i) *Location:* 29°05'22.3"N., 90°34'43"W.; thence following a line 1000 feet west of the channel centerline to 29°02'17.8"N., 90°34'28.4"W.; thence to 29°02'12.6"N., 90°35'27.8"W.; thence to 29°05'30.8"N., 90°35'27.8"W.; thence to the point of beginning.

(ii) *Size*: 2.08 square nautical miles.
(iii) *Depth*: Ranges from 6 to 30 feet.
(iv) *Primary Use*: Dredged material.
(v) *Period of Use*: Continuing use.
(vi) *Restrictions*: Disposal shall be limited to dredged material from the vicinity of Cat Island Pass, Louisiana.

(5) Calcasieu, LA Dredged Material Site 1.

(i) *Location:* 29°45'39"N., 93°19'36"W.; 29°42'42"N., 93°19'06"W.; 29°42'36"N., 93°19'48"W.; 29°44'42"N., 93°20'12"W.; 29°44'42"N., 93°20'24"W.; 29°45'27"N., 93°20'33"W.

(ii) *Size*: 1.76 square nautical miles.
(iii) *Depth*: Ranges from 2 to 8 meters.
(iv) *Primary Use*: Dredged material.
(v) *Period of Use*: Continuing use.
(vi) *Restriction*: Disposal shall be limited to dredged material from the vicinity of the Calcasieu River and Pass Project.

(6) Calcasieu, LA Dredged Material Site 2.

(i) *Location*: 29°44'31"N., 93°20'43"W.; 29°39'45"N., 93°19'56"W.; 29°39'34"N., 93°20'46"W.; 29°44'25"N., 93°21'33"W.

(ii) *Size*: 3.53 square nautical miles.
(iii) *Depth*: Ranges from 2 to 11 meters.
(iv) *Primary Use*: Dredged material.
(v) *Period of Use*: Continuing use.
(vi) *Restriction*: Disposal shall be limited to dredged material from the vicinity of the Calcasieu River and Pass Project.

(7) Calcasieu, LA Dredged Material Site 3.

(i) *Location*: 29°37'50"N., 93°19'37"W.; 29°37'25"N., 93°19'33"W.; 29°33'55"N., 93°16'23"W.; 29°33'49"N., 93°16'5"W.; 29°30'59"N., 93°13'51"W.; 29°29'10"N., 93°13'49"W.; 29°29'05"N., 93°14'23"W.; 29°30'49"N., 93°14'25"W.; 29°37'26"N., 93°20'24"W.; 29°37'44"N., 93°20'27"W.

(ii) *Size*: 5.88 square nautical miles.
(iii) *Depth*: Ranges from 11 to 14 meters.
(iv) *Primary Use*: Dredged material.
(v) *Period of Use: Continuing use.*
(vi) *Restriction*: Disposal shall be limited to dredged material from the vicinity of the Calcasieu River and Pass Project.

(8) Sabine-Neches, TX Dredged Material Site 1.

(i) *Location*: 29°28'03"N., 93°41'14"W.; 29°26'11"N., 93°41'14"W.; 29°26'11"N., 93°44'11"W.

(ii) *Size*: 2.4 square nautical miles.
(iii) *Depth*: Ranges from 11–13 meters.
(iv) *Primary Use*: Dredged material.
(v) *Period of Use*: Continuing use.
(vi) *Restriction*: Disposal shall be limited to dredged material from the Sabine-Neches area.

(9) Sabine-Neches, TX Dredged Material Site 2.

(i) *Location*: 29°30'41"N., 93°43'49"W.; 29°28'42"N., 93°41'33"W.; 29°28'42"N., 93°44'49"W.; 29°30'08"N., 93°46'27"W.

(ii) *Size*: 4.2 square nautical miles.
(iii) *Depth*: Ranges from 9–13 meters.
(iv) *Primary Use*: Dredged material.
(v) *Period of Use: Continuing use.*
(vi) *Restriction*: Disposal shall be limited to dredged material from the Sabine-Neches area.

(10) Sabine-Neches, TX Dredged Material Site 3.

(i) *Location*: 29°34'24"N., 93°48'13"W.; 29°32'47"N., 93°46'16"W.; 29°32'06"N., 93°46'29"W.; 29°31'42"N., 93°48'16"W.; 29°32'59"N., 93°49'48"W.

(ii) *Size*: 4.7 square nautical miles.
(iii) *Depth*: 10 meters.
(iv) *Primary Use*: Dredged material.
(v) *Period of Use*: Continuing use.
(vi) *Restriction*: Disposal shall be limited to dredged material from the Sabine-Neches area.

(11) Sabine-Neches, TX. Dredged Material Site 4.

(i) *Location*: 29°38'09"N., 93°49'23"W.; 29°35'53"N., 93°48'18"W.; 29°35'06"N., 93°50'24"W.; 29°36'37"N., 93°51'09"W.; 29°37'00"N., 93°50'06"W.; 29°37'46"N., 93°50'26"W.

(ii) *Size*: 4.2 square nautical miles.
(iii) *Depth:* Ranges from 5–9 meters.
(iv) *Primary Use:* Dredged material.
(v) *Period of Use:* Continuing use.
(vi) *Restriction:* Disposal shall be limited to dredged material from the Sabine-Neches area.

(12) Galveston, TX Dredged Material Site.

(i) *Location:* 29°18'00"N., 94°39'30"W.; 29°15'54"N., 94°37'06"W.; 29°14'24"N., 94°38'42"W.; 29°16'54"N., 94°41'30"W.

(ii) *Size:* 6.6 square nautical miles.
(iii) *Depth:* Ranges from 10 to 15.5 meters.
(iv) *Primary Use:* Dredged material.
(v) *Period of Use:* Continuing use.
(vi) *Restriction:* Disposal shall be limited to dredged material from the Galveston, Texas area.

(13) Freeport Harbor, TX, New Work (45 Foot Project).

(i) *Location:* 28°50'51"N., 95°13'54"W ; 28°51'44"N., 95°14'49"W.; 28°50'15"N., 95°16'40"W.; 28°49'22"N., 95°15'45"W.

(ii) *Size:* 2.64 square nautical miles.
(iii) *Depth:* 54 to 61 feet.
(iv) *Primary Use:* Construction (new work) dredged material.
(v) *Period of Use:* Indefinite period of time.
(vi) *Restriction:* Disposal shall be limited to dredged material from the Freeport Harbor Entrance and Jetty Channels, Texas.

(14) Freeport Harbor, TX, Maintenance (45 Foot Project).

(i) *Location:* 28°54'00"N., 95°15'49"W.; 28°53'28"N., 95°15'16"W.; 28°52'00"N., 95°16'59"W.; 28°52'32"N., 95°17'32"W.

(ii) *Size:* 1.53 square nautical miles.
(iii) *Depth:* 31 to 38 feet.
(iv) *Primary use:* Maintenance dredged material.
(v) *Period of Use:* Indefinite period of time.
(vi) *Restriction:* Disposal shall be limited to dredged material from the Freeport Harbor Entrance and Jetty Channels, Texas.

(15) Matagorda Ship Channel, TX.

(i) *Location:* 28°23'48"N., 96°18'00"W.; 28°23'21"N., 96°18'31"W.; 28°22'43"N., 96°17'52"W.; 28°23'11"N., 96°17'22"W.

(ii) *Size:* 0.56 square nautical mile.
(iii) *Depth:* Ranges from 25–40 feet.
(iv) *Primary Use:* Dredged Material.
(v) *Period of Use:* Indefinite period of time.
(vi) *Restriction:* Disposal shall be limited to dredged material from the Matagorda Ship Channel, Texas.

(16) Homeport Project, Port Aransas, TX.

(i) *Location:* 27°47'42" N., 97°00'12" W.; 27°47'15" N., 96°59'25" W.; 27°46'17" N., 97°01'12" W.; 27°45'49" N., 97°00'25" W.

(ii) *Size:* 1.4 square miles.
(iii) *Depth:* Ranges from 45–55 feet.
(iv) *Primary Use:* Dredged material.
(v) *Period of Use:* 50 years.
(vi) *Restriction:* Disposal shall be limited to dredged material from the U.S. Navy Homeport Project, Corpus Christi/Ingleside, TX.

(17) Corpus Christi Ship Channel, TX.

(i) *Location:* 27°49'10"N., 97°01'09"W.; 27°48'42"N., 97°00'21"W.; 27°48'06"N., 97°00'48"W.; 27°48'33"N., 97°01'36"W.

(ii) *Size:* 0.63 square nautical mile.
(iii) *Depth:* Ranges from 35 to 50 feet.
(iv) *Primary use:* Dredged material.
(v) *Period of use:* Indefinite period of time.
(vi) *Restrictions:* Disposal shall be limited to dredged material from the Corpus Christi Ship Channel, Texas.

(18) Port Mansfield, TX.

(i) *Location:* 26°34'24"N., 97°15'15"W.; 26°34'26"N., 97°14'17"W.; 26°33'57"N., 97°14'17"W.; 26°33'55"N., 97°15'15"W.

(ii) *Size:* 0.42 Square nautical miles.

(iii) *Depth:* Ranges from 35–50 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Indefinite period of time.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Port Mansfield Entrance Channel, Texas.

(19) Brazos Island Harbor, TX.

(i) *Location:* 26°04'32" N., 97°07'26" W.; 26°04'32" N., 97°06'30" W.; 26°04'02" N., 97°06'30" W.; 26°04'02" N., 97°07'26" W.

(ii) *Size:* 0.42 square nautical miles.

(iii) *Depth:* Ranges from 55 to 65 feet.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Indefinite period of time.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Brazos Island Harbor Entrance Channel, Texas.

(20) Brazos Island Harbor (42-Foot Project), TX.

(i) *Location:* 26°04'47" N., 97°05'07" W.; 26°05'16" N., 97°05'04" W.; 26°05'10" N., 97°04'06" W.; 26°04'42" N., 97°04'09" W.

(ii) *Size:* 0.42 square nautical miles.

(iii) *Depth: Ranges from 60–67 feet.*

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Indefinite period of time.

(vi) *Restrictions:* Disposal shall be limited to construction material dredged from the Brazos Island Harbor Entrance Channel, Texas.

(k) Region VI Final Other Wastes Sites.

(1) No final sites.

(2) [Reserved]

(l) Region IX Final Dredged Material Sites.

(1) San Diego, CA (LA–5).

(i) *Location:* Center coordinates of the site are: 32°36.83' North Latitude and 117°20.67' West Latitude (North American Datum from 1927), with a radius of 3,000 feet (910 meters).

(ii) *Size:* 0.77 square nautical miles.

(iii) *Depth:* 460 to 660 feet (145 to 200 meters).

(iv) *Primary Use:* Ocean dredged material disposal.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged materials that comply with EPA's Ocean Dumping Regulations and Corps Permitting Regulations.

(2) Los Angeles/Long Beach, CA (LA–2).

(i) *Location:* 33°37.10' North Latitude by 118°17.40' West Longitude (North American Datum from 1983), with a radius of 3,000 feet (910 meters).

(ii) *Size:* 0.77 square nautical miles.

(iii) *Depth:* 380 to 1060 feet (110 to 320 meters).

(iv) *Primary use:* Ocean dredged material disposal.

(v) *Period of use:* Continuing use, subject to submission of a revised Consistency Determination to the California Coastal Commission after 5 years of site management and monitoring.

(vi) *Restrictions:* Disposal shall be limited to dredged sediments that comply with EPA's Ocean Dumping Regulations.

(3) San Francisco Deepwater Ocean Site (SF–DODS) Ocean Dredged Material Disposal Site—Region IX.

(i) *Location:* Center coordinates of the oval-shaped site are: 37°39.0' North latitude by 123°29.0' West longitude (North American Datum from 1983), with length (north-south axis) and width (west-east axis) dimensions of approximately 4 nautical miles (7.5 kilometers) and 2.5 nautical miles (4.5 kilometers), respectively.

(ii) *Size:* 6.5 square nautical miles (22 square kilometers).

(iii) *Depth:* 8,200 to 9,840 feet (2,500 to 3,000 meters).

(iv) *Use Restricted to Disposal of:* Dredged materials.

(v) *Period of Use:* Continuing use over 50 years from date of site designation, subject to restrictions and provisions set forth below.

(vi) *Restrictions/provisions:* The remainder of this § 228.15(l)(3) (hereinafter referred to as "this section") constitutes the required Site Management and Monitoring Plan (SMMP) for the SF–DODS. This SMMP shall be supplemented by a Site Management and Monitoring Plan Implementation Manual (SMMP Implementation Manual) containing more detailed operational guidance. The SMMP Implementation Manual may be periodically revised as necessary; proposed revisions to the SMMP Implementation Manual shall be made following opportunity for public review and comment. SF–DODS use shall be subject to the following restrictions and provisions:

(vii) *Type and capacity of disposed materials.* The interim site disposal capacity shall be 6 million cubic yards of suitable dredged material per year until December 31, 1996. Thereafter, the capacity of the SF–DODS shall be set in a separate rulemaking based on either a comprehensive long-term management strategy for management of dredged materials from San Francisco Bay (reflected in an EPA-prepared dredged material management planning document) or a separate alternatives-based EPA evaluation of the need for ocean disposal. This separate rulemaking will identify the appropriate site capacity for the remaining life of this site designation. No disposal at the SF–DODS may occur after December 31, 1996 without subsequent promulgation by Rule of appropriate annual site disposal capacity.

(viii) *Permit/project conditions.* Paragraph (l)(3)(viii)(A) of this section sets forth requirements for inclusion in permits to use the SF–DODS, and in all Army Corps of Engineers federal project authorizations. Paragraph (l)(3)(viii)(B) of this section describes additional project-specific conditions that will be required of disposal permits and operations as appropriate. Paragraph (l)(3)(viii)(C) of this section describes how alternative permit conditions may be authorized by EPA and the Corps of Engineers. All references to "permittees" shall be deemed to include the Army Corps of Engineers when implementing a federal dredging project.

(A) *Mandatory conditions.* All permits or federal project authorizations authorizing use of the SF–DODS shall include the following conditions, unless approval for an alternative permit condition is sought and granted pursuant to paragraph (l)(3)(viii)(C) of this section:

(1) Transportation of dredged material to the SF–DODS shall only be allowed when weather and sea state conditions will not interfere with safe transportation and will not create risk of spillage, leak or other loss of dredged material in transit to the SF–DODS. No disposal vessel trips shall be initiated when the National Weather Service has predicted combined seas in excess of eighteen feet or has issued a gale warning for local waters during the time period necessary for the disposal vessel to complete dumping operations.

(2) All vessels used for dredged material transportation and disposal must be load-lined at a level at which dredged material is not expected to be spilled in transit under anticipated sea state conditions. Disposal vessels shall not be filled above their load limitations. Before any disposal vessel departs for the SF–DODS, an independent quality control inspector must certify that it is filled correctly. For purposes of paragraph (l)(3)(viii) of this section, "independent" means not an employee of the permittee; however, the Corps of Engineers may provide inspectors for Corps of Engineers disposal operations.

(3) Dredged material shall not be leaked or spilled from disposal vessels during transit to the SF–DODS.

(4) Disposal vessels in transit to and from the SF–DODS shall remain at least three nautical miles from the Farallon Islands at all times.

(5) When dredged material is discharged within the SF–DODS, no portion of the vessel from which materials are released (for example, a hopper dredge vessel or a towed barge) can be further than 3,200 feet from the center of the target area, centered at 37°39′N, 123°29′W.

(6) No more than one disposal vessel may be present within the permissible dumping target area referred to in paragraph (l)(3)(viii)(A)(5) of this section at any time.

(7) Disposal vessels shall use an appropriate navigation system capable of indicating the position of the vessel carrying dredged material (for example, a hopper dredge vessel or a towed barge) with a minimum accuracy and precision of 100 feet during all disposal operations. If the positioning system fails, all disposal operations must cease until the navigational capabilities are restored.

(8) The permittee shall maintain daily records of the amount of material dredged and loaded into barges for disposal, the times that disposal vessel depart for, arrive at and return from the SF–DODS, the exact locations and times of disposal, and the volumes of material disposed at the SF–DODS during each vessel trip. The permittee shall further record wind and sea state observations at intervals to be established in the permit.

(9) For each disposal vessel trip, the permittee shall maintain a computer printout from a Global Positioning System or other acceptable navigation system showing transit routes and disposal coordinates, including the time and position of the disposal vessel when dumping was commenced and completed.

(10) An independent quality control inspector (as defined in paragraph (l)(3)(viii)(A)(*2*)) of this section shall observe all dredging and disposal operations. The inspector shall verify the information required in paragraphs (l)(3)(viii)(A)(*8*) and (*9*) of this section. The inspector shall promptly inform permittees of any inaccuracies or discrepancies concerning this information and shall prepare summary reports, which summarize all such inaccuracies and discrepancies, from time to time as shall be specified in permits. Such summary reports shall be sent by the permittee to the District Engineer and the Regional Administrator within a time interval that shall be specified in the permit.

(11) The permittee shall report any anticipated or actual permit violations to the District Engineer and the Regional Administrator within 24 hours of discovering such violations. In addition, the permittee shall prepare and submit reports, certified accurate by the independent quality control inspector, on a frequency that shall be specified in permits, to the District Engineer and the Regional Administrator setting forth the information required by paragraphs (l)(3)(viii)(A)*(8)* and *(9)* of this section.

(12) Permittees shall allow observers from the Point Reyes Bird Observatory or other appropriate independent observers as specified in permits to be present on disposal vessels on all trips to the SF–DODS for the purpose of conducting shipboard surveys of seabirds and marine mammals. In addition, permittees shall ensure that independent observers are present on a sufficient number of vessel trips to characterize fully the potential impact of disposal site use on seabirds and marine mammals, taking into account, to the extent feasible, seasonal variations in such potential impacts. At a minimum, permittees shall ensure that independent observers are present on at least one disposal trip in any calendar month in which a disposal trip to the SF-DODS is made.

(13) At the completion of short-term dredging projects or annually for on-going projects, permittees shall prepare and submit to the District Engineer and the Regional Administrator complete pre-dredging and post-dredging bathymetric surveys showing the depth of all areas dredged, including side slope areas, before and after dredging. Permittees shall include a report indicating whether any dredged material was dredged outside of areas authorized for dredging or was dredged within project boundaries at depths deeper than authorized for dredging by their permits.

(B) *Project-specific conditions.* Permits or federal project authorizations authorizing use of the SF–DODS may include the following conditions, if EPA determines these conditions are necessary to facilitate safe use of the SF–DODS, the prevention of potential harm to the environment or accurate monitoring of site use:

(1) Permittees may be required to limit the speed of disposal vessels in transit to the SF-DODS to a rate that is safe under the circumstances and will prevent the spillage of dredged materials.

(2) Permittees may be required to use automated data logging systems for recording navigation and disposal coordinates and/or load levels throughout disposal trips when such systems are feasible and represent an improvement over manual recording methodologies.

(3) Any other conditions that EPA or the Corps of Engineers determine to be necessary or appropriate to facilitate compliance with the requirements of the MPRSA and this section may be included in site use permits.

(C) *Alternative permit/project conditions.* Alternatives to the permit conditions specified in paragraph (l)(3)(viii) of this section in a permit or federal project authorization may be authorized if the permittee demonstrates to the District Engineer and the Regional Administrator that the alternative conditions are sufficient to accomplish the specific intended purpose of the permit condition in issue and further demonstrates that the waiver will not increase the risk of harm to the environment, the health or safety of persons, nor will impede monitoring of compliance with the MPRSA, regulations promulgated under the MPRSA, or any permit issued under the MPRSA.

(ix) *Site monitoring.* Data shall be collected in accordance with a three-tiered site monitoring program which consists of three interdependent types of monitoring for each tier: Physical, chemical and biological. In addition, periodic confirmatory monitoring concerning potential site contamination shall be performed. Specific guidance for site monitoring tasks required by this paragraph shall be described in a Site Management and Monitoring Implementation Manual (SMMP Implementation Manual) developed by EPA. The SMMP Implementation Manual shall be reviewed periodically and any necessary revisions to the Manual will be issued for public review under an EPA Public Notice.

(A) *Tier 1 monitoring activities.* Tier 1 monitoring activities shall consist of the following:

(1) Physical monitoring. Tier 1 Physical Monitoring shall consist of a physical survey to map the area on the seafloor within and in the vicinity of the disposal site where dredged material has been deposited (the footprint). Such a survey shall use appropriate technology (for example, sediment profile photography) to determine the areal extent and thickness of the disposed dredged material, and to determine if any dredged material has deposited outside of the disposal site boundary.

(2) Chemical monitoring. Tier 1 Chemical Monitoring shall consist of collecting, processing, and preserving boxcore samples of sediments so that

such sediments could be subjected to sediment chemistry analysis in the appropriate tier. Samples shall be collected within the dredged material footprint, outside of the dredged material footprint, and outside of the disposal site boundaries. Samples within the footprint shall be subjected to chemical analysis in annual Tier 1 activity. Samples from outside of the footprint and outside of the disposal site boundaries shall be archived and analyzed only when the criteria requiring Tier 2 as specified in paragraph (l)(3)(x) of this section are met. A sufficient number of samples shall be collected so that the potential for adverse impacts due to elevated chemistry can be assessed with an appropriate time-series or ordinal technique.

(3) Biological monitoring. Tier 1 Biological Monitoring shall have two components: Monitoring of pelagic communities and monitoring of benthic communities.

(i) Pelagic communities. Tier 1 Biological Monitoring shall include regional surveys of seabirds, marine mammals and mid-water column fish populations appropriate for evaluating how these populations might be affected by disposal site use. A combination of annual regional and periodic (random) shipboard surveys of seabirds and marine mammals will be used. The regional survey designs for each category of biota shall be similar to that used for the regional characterization studies referenced in the Final Environmental Impact Statement for Designation of a Deep Water Ocean Dredged Material Disposal Site off San Francisco, California (August 1993) with appropriate realignments to accommodate transects within and in the vicinity of the SF–DODS. The periodic shipboard surveys shall be performed from vessels involved in dredged material disposal operations at the SF–DODS as specified in permit conditions imposed pursuant to paragraph (l)(3)(viii)(A)(12) of this section. The minimum number of surveys must be sufficient to characterize the disposal operations for each project, and, as practicable, provide seasonal data for an assessment of the potential for adverse impacts for the one-year period. An appropriate time-series (ordinal), and community analysis shall be performed using data collected during the current year and previous years.

(ii) Benthic communities. Tier 1 Biological Monitoring shall include collection and preservation of boxcore samples of benthic communities so that such samples could be analyzed as a Tier 2 activity.

(4) Annual reporting. The results of the annual Tier 1 studies shall be compiled in an annual report which will be available for public review.

(B) Tier 2 monitoring activities. Tier 2 monitoring activities shall consist of the following:

(1) Physical monitoring. Tier 2 Physical Monitoring shall consist of oceanographic studies conducted to validate and/or improve the models used to predict the dispersion in the water column and deposition of dredged material on the seafloor at the SF–DODS. The appropriate physical oceanographic studies may include: The collection of additional current meter data, deployment of sediment traps, and deployment of surface and subsurface drifters.

(2) Chemical monitoring. Tier 2 Chemical Monitoring shall consist of performing sediment chemistry analysis on samples collected and preserved in Tier 1 from outside of the footprint and outside of the disposal site boundaries.

(3) Biological monitoring. Tier 2 Biological Monitoring shall involve monitoring of pelagic communities and monitoring of benthic communities.

(i) Pelagic communities. Tier 2 Biological Monitoring for pelagic communities shall include supplemental surveys of similar type to those in Tier 1, or other surveys as appropriate.

(ii) Benthic communities. Tier 2 Biological Monitoring for benthic communities shall include a comparison of the benthic community within the dredged material footprint to benthic communities in adjacent areas outside of the dredged material footprint. An appropriate time-series (ordinal) and community analysis shall be performed using data collected during the current year and previous years to determine whether there are adverse changes in the benthic populations outside of the disposal site which may endanger the marine environment.

(4) Annual reporting. The results of any required Tier 2 studies shall be compiled in an annual report which will be available for public review.

(C) *Tier 3 monitoring activities.* Tier 3 monitoring activities shall consist of the following:

(1) Physical monitoring. Tier 3 physical monitoring shall consist of advanced oceanographic studies to study the dispersion of dredged material in the water column and the deposition of dredged material on the seafloor in the vicinity of the SF-DODS. Such physical monitoring may include additional, intensified studies involving the collection of additional current meter data, deployment of sediment traps, and deployment of surface and subsurface drifters. Such studies may include additional sampling stations, greater frequency of sampling, more advanced sampling methodologies or equipment, or other additional increased study measures compared to similar studies conducted in Tier 1 or 2.

(2) Chemical monitoring. Tier 3 Chemical Monitoring shall consist of analysis of tissues of appropriate field-collected benthic and/or epifaunal organisms to determine bioaccumulation of contaminants that may be associated with dredged materials deposited at the SF-DODS. Sampling and analysis shall be designed and implemented to determine whether the SF-DODS is a source of adverse bioaccumulation in the tissues of benthic species collected at or outside the SF-DODS, compared to adjacent unimpacted areas, which may endanger the marine environment. Appropriate sampling methodologies for these tests will be determined and the appropriate analyses will involve the assessment of benthic body burdens of contaminants and correlation with comparison of the benthic communities inside and outside of the sediment footprint.

(3) Biological monitoring. Tier 3 biological monitoring shall have two components: monitoring of pelagic communities and monitoring of benthic communities.

(i) Pelagic communities. Tier 3 Biological Monitoring shall include advanced studies of seabirds, marine mammals and mid-water column fish to evaluate how these populations might be affected by disposal site use. Such studies may include additional sampling stations, greater frequency of sampling, more advanced sampling methodologies or equipment, or other additional increased study measures compared to similar studies conducted in Tier 1 or 2. Studies may include evaluation of sub-lethal changes in the health of pelagic organisms, such as the development of lesions, tumors, developmental abnormality, decreased fecundity or other adverse sub-lethal effect.

(ii) Benthic communities. Tier 3 Biological Monitoring shall include advanced studies of benthic communities to evaluate how these populations might be affected by disposal site use. Such studies may include additional sampling stations, greater frequency of sampling, more advanced sampling methodologies or equipment, or other additional increased study measures compared to

similar studies conducted in Tier 2. Studies may include evaluation of sub-lethal changes in the health of benthic organisms, such as the development of lesions, tumors, developmental abnormality, decreased fecundity or other adverse sub-lethal effect.

(4) Reporting. The results of any required Tier 3 studies shall be compiled in a report which will be available for public review.

(D) *Periodic confirmatory monitoring.* At least once every three years, the following confirmatory monitoring activities will be conducted and results compiled in a report which will be available for public review: Samples of sediments taken from the dredged material footprint shall be subjected to bioassay testing using one or more appropriate sensitive marine species consistent with applicable ocean disposal testing guidance ("Green Book" or related Regional Implementation Agreements), as determined by the Regional Administrator, to confirm whether contaminated sediments are being deposited at the SF–DODS despite extensive pre-disposal testing. In addition, near-surface arrays of appropriate filter-feeding organisms (such as mussels) shall be deployed in at least three locations in and around the disposal site for at least one month during active site use, to confirm whether substantial bioaccumulation of contaminants may be associated with exposure to suspended sediment plumes from multiple disposal events. One array must be deployed outside the influence of any expected plumes to serve as a baseline reference.

(x) *Site management actions.* Once disposal operations at the site begin, the three-tier monitoring program described in paragraphs (l)(3)(ix) (A) through (C) of this section shall be implemented on an annual basis, through December 31, 1996, independent of the actual volumes disposed at the site. Thereafter, the Regional Administrator may establish a minimum annual disposal volume (not to exceed 10 percent of the designated site capacity at any time) below which this monitoring program need not be fully implemented. The Regional Administrator shall promptly review monitoring reports for the SF–DODS along with any other information available to the Regional Administrator concerning site monitoring activities. If the information gathered from monitoring at a given monitoring tier is not sufficient for the Regional Administrator to base reasonable conclusions as to whether disposal at the SF–DODS might be endangering the marine ecosystem, then the Regional Administrator shall require intensified monitoring at a higher tier. If monitoring at a given tier establishes that disposal at the SF–DODS is endangering the marine ecosystem, then the Regional Administrator shall require modification, suspension or termination of site use.

(A) *Selection of site monitoring tiers—(1) Physical monitoring.* Physical monitoring shall remain limited to Tier 1 monitoring when Tier 1 monitoring establishes that no significant amount of dredged material has been deposited or transported outside of the site boundaries. Tier 2 monitoring shall be employed when Tier 1 monitoring is insufficient to conclude that a significant amount of dredged material as defined in paragraph (l)(3)(x)(A)*(4)* of this section has not been deposited or transported outside of the site boundaries.

(2) Chemical monitoring. (i) Chemical monitoring shall remain limited to Tier 1 Chemical Monitoring when the results of Physical Monitoring indicate that a significant amount of dredged material as defined in paragraph (l)(3)(x)(A)*(4)* of this section has not been deposited or transported off-site, and Tier 1 Chemical Monitoring establishes that dredged sediments deposited at the disposal site do not contain levels of chemical contaminants that are significantly elevated above the range of chemical contaminant levels in dredged sediments that the Regional Administrator and the District Engineer found to be suitable for disposal at the SF–DODS pursuant to 40 CFR part 227.

(ii) Tier 2 monitoring shall be employed when the results of Physical Monitoring indicate that a significant amount of dredged material as defined in paragraph (l)(3)(x)(A)*(4)* of this section has been deposited off-site, and Tier 1 Chemical Monitoring is insufficient to establish that dredged sediments deposited at the disposal site do not contain levels of chemical contaminants that are significantly elevated above the range of chemical contaminant levels in dredged sediments that the Regional Administrator and the District Engineer found to be suitable for disposal at the SF–DODS pursuant to 40 CFR part 227.

The Regional Administrator may employ Tier 2 monitoring when available evidence indicates that a significant amount of dredged material as defined in paragraph (l)(3)(x)(A)*(4)* of this section has been deposited near the SF–DODS site boundary.

(iii) Tier 3 monitoring shall be employed within and outside the dredged material footprint when Tier 2 Chemical Monitoring is insufficient to establish that dredged sediments deposited at the disposal site do not contain levels of chemical contaminants that are significantly elevated above the range of chemical contaminant levels in dredged sediments that the Regional Administrator and the District Engineer found to be suitable for disposal at the SF–DODS pursuant to 40 CFR part 227.

(3) Biological monitoring. (i) Pelagic communities. Biological monitoring for pelagic communities shall remain limited to Tier 1 monitoring when Tier 1 monitoring establishes that disposal at the SF–DODS has not endangered the monitored pelagic communities. When Tier 1 monitoring is insufficient to make reasonable conclusions whether disposal at the site has endangered the monitored pelagic communities, then Tier 2 monitoring of pelagic communities shall be employed. When Tier 2 monitoring is insufficient to make reasonable conclusions whether disposal at the site has endangered the monitored pelagic communities, then Tier 3 monitoring of pelagic communities shall be employed.

(ii) Benthic communities. Biological monitoring for benthic communities shall remain limited to Tier 1 monitoring when physical monitoring establishes that a significant amount of dredged material has not been deposited outside of the site boundaries. If physical monitoring indicates that a significant amount of dredged material has been deposited or transported outside of the site boundaries, then Tier 2 analysis of benthic communities shall be performed. If Chemical Monitoring establishes that there is significant bioaccumulation of contaminants in organisms sampled from within or outside the dredged material footprint, then Tier 3 Biological Monitoring of the disposal site shall be employed. Tier 3 Biological Monitoring may replace Tier 3 Chemical Monitoring if observed biological effects are established as surrogate indicators for bioaccumulation of chemical contaminants in sampled organisms.

(4) Definition of significant dredged material accumulation. For purposes of this paragraph (l)(3)(x)(A) of this section, dredged material accumulation on the ocean bottom to a thickness of five centimeters shall be considered to be a significant amount of dredged material. The Regional Administrator may determine that a lesser amount of accumulation is significant if available evidence indicates that a lesser amount of off-site accumulation could endanger marine resources.

(B) *Modification, suspension or termination of site use. (1)* If the results of site monitoring or other information indicate that any of the following are

occurring as a result of disposal at the SF–DODS, then the Regional Administrator shall modify, suspend, or terminate site use overall, or for individual projects as appropriate:

(i) Exceedance of Federal marine water quality criteria within the SF–DODS following initial mixing as defined in 40 CFR 227.29(a) or beyond the site boundary at any time;

(ii) Placement or movement of significant quantities of disposed material outside of site boundaries near or toward significant biological resource areas or marine sanctuaries;

(iii) Endangerment of the marine environment related to potentially significant adverse changes in the structure of the benthic community outside the disposal site boundary;

(iv) Endangerment to the health, welfare, or livelihood of persons or to the environment related to potentially significant adverse bioaccumulation in organisms collected from the disposal site or areas adjacent to the site boundary compared to the reference site;

(v) Endangerment to the health, welfare, or livelihood of persons related to potentially significant adverse impacts upon commercial or recreational fisheries resources near the site; or

(vi) Endangerment to the health, welfare, or livelihood of persons or to the environment related to any other potentially significant adverse environmental impacts.

(2) The Regional Administrator shall modify site use, rather than suspend or terminate site use, when site use modification will be sufficient to eliminate the adverse environmental impacts referred to in paragraphs (l)(3)(x)(B)*(1) (i)* or *(ii)* of this section or the endangerment to human health, welfare or livelihood to the environment referred to in paragraphs (l)(3)(x)(B)*(1) (iii)* through *(vi)* of this section. Notwithstanding the provisions of any permit or federal project authorization authorizing site use, the Regional Administrator shall order, following opportunity for public comment, any of the following modifications to site use that he or she deems necessary to eliminate the adverse environmental effect or endangerment to human health, welfare, or livelihood or to the environment:

(i) Change or additional restrictions upon the permissible times, rates and total volume of disposal of dredged material at the SF–DODS;

(ii) Change or additional restrictions upon the method of disposal or transportation of dredged materials for disposal; or

(iii) Change or additional limitations upon the type or quality of dredged materials according to chemical, physical, bioassay toxicity, or bioaccumulation characteristics.

(3) The Regional Administrator shall suspend site use when site use suspension is both necessary and sufficient to eliminate any adverse environmental effect or endangerment to human health, welfare, or livelihood or to the environment referred to in paragraph (l)(3)(x)(B)*(1)* of this section. Notwithstanding the provisions of any permit or federal project authorization authorizing site use, the Regional Administrator shall order, following opportunity for public comment, site use suspension until an appropriate management action is identified or for a time period that will eliminate the adverse environmental effect or endangerment to human health, welfare, or livelihood or to the environment.

(4) Notwithstanding the provisions of any permit or federal project authorization authorizing site use, the Regional Administrator shall order, following opportunity for public comment, site use permanently terminated if this is the only means for eliminating the adverse environmental impacts referred to in paragraphs (l)(3)(x)(B)*(1) (i)* or *(ii)* of this section or the endangerment to human health, welfare or livelihood to the environment referred to in paragraphs (l)(3)(x)(B)*(1) (iii)* through *(vi)* of this section.

(4) Channel Bar Site, San Francisco, CA (SF–8).

(i) *Location*: 37°44'55"N., 122°37'18"W; 37°45'45"N., 122°34'24"W.; 37°44'24"N., 122°37'06"W.; 37°45'15"N., 122°34'12"W.

(ii) *Size*: 4,572 x 914 meters.

(iii) *Depth*: Ranges from 11 to 14.3 meters.

(iv) *Primary Use*: Dredged material.

(v) *Period of Use*: Continuing use.

(vi) *Restriction*: Disposal shall be limited to material from required dredging operations at the entrance of the San Francisco main ship channel which is composed primarily of sand having grain sizes compatible with naturally occurring sediments at the disposal site and containing approximately 5 percent of particles having grain sizes finer than that normally attributed to very fine sand (.075 millimeters). Other dredged materials meeting the requirements of 40 CFR 227.13 but having smaller grain sizes may be dumped at this site only upon completion of an appropriate case-by-case evaluation of the impact of such material on the site which demonstrates that such impact will be acceptable.

(5) Hilo, HI.

(i) *Location*: (center point): Latitude—19°48'30"N.; Longitude—154°58'30"W.

(ii) *Size*: Circular with a radius of 920 meters.

(iii) *Depth*: Ranges from 330 to 340 meters.

(iv) *Primary Use*: Dredged material.

(v) *Period of Use*: Continuing use.

(vi) *Restriction*: Disposal shall be limited to dredged material.

(6) Kahului, HI.

(i) *Location*: (center point): Latitude—21°04'42"N.; Longitude—156°29'00"W.

(ii) *Size:* Circular with a radius of 920 meters.

(iii) *Depth:* Ranges from 345 to 365 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(7) South Oahu, HI.

(i) *Location:* (center point): Latitude—21°15'10" N.; Longitude—157°56'50" W.

(ii) *Size:* 2 kilometers wide and 2.6 kilometers long.

(iii) *Depth:* Ranges from 400 to 475 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(8) Nawiliwili, HI.

(i) *Location:* (centerpoint): Latitude—21°55'00" N. Longitude—159°17'00" W.

(ii) *Size:* Circular with a radius of 920 meters.

(iii) *Depth:* Ranges from 840 to 1,120 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(9) Port Allen, HI.

(i) *Location:* (center point) Latitude—21°50'00" N. Longitude—159°35'00" W.

(ii) *Size:* Circular with a radius of 920 meters.

(iii) *Depth:* Ranges from 1,460 to 1,610 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material.

(m) Region IX Final Other Wastes Sites.

(1) Fish Processing Waste Disposal Site, American Samoa.

(i) *Location:* 14°24.00' South latitude by 170°38.30' West longitude (1.5 nautical mile radius).

(ii) *Size:* 7.07 square nautical miles.

(iii) *Depth:* 1,502 fathoms (2,746 meters or 9,012 feet).

(iv) *Primary Use:* Disposal of fish processing wastes.

(v) *Period of Use:* Continued use.

(vi) *Restriction:* Disposal shall be limited to dissolved air flotation (DAF) sludge, presswater, and precooker water produced as a result of fish processing operations at fish canneries generated in American Samoa.

(2) [Reserved].

(n) Region X Final Dredged Material Sites.

(1) Chetco, OR, Dredged Material Site.

(i) *Location:* 42°01'55" N., 124°16'37" W.; 42°01'55" N., 124°16'13" W.; 42°01'37" N., 124°16'13" W.; and 42°01'37" N., 124°16'37" W. (NAD83)

(ii) *Size:* 0.09 square nautical mile.

(iii) *Depth:* 21 meters (average).

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material determined to be suitable for unconfined disposal from the Chetco Estuary and River and adjacent areas.

(2) Coos Bay, OR Dredged Material Site E.

(i) *Location:* 43°21'59" N., 124°22'45" W.;43°21'48" N., 124°21'59" W.; 43°21'35" N., 124°22'05" W.; 43°21'46" N., 124°22'51" W.

(ii) *Size:* 0.13 square nautical mile.

(iii) *Depth:* Averages 17 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material in the Coos Bay area of type 1, as defined in the site designation final EIS.

(3) Coos Bay, OR Dredged Material Site F.

(i) *Location:* 43°22'44" N., 124°22'18" W.; 43°22'29" N., 124°21'34" W.; 43°22'16" N., 124°21'42" W.; 43°22'31" N., 124°22'26" W.

(ii) *Size:* 0.13 square nautical mile.

(iii) *Depth:* Averages 24 meters.

(iv) *Primary Use:* Dredged material.

(v) *Period of Use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material in the Coos Bay area of type 1, as defined in the site designation final EIS.

(4) Coos Bay, OR Dredged Material Site H.

(i) *Location:* 43°23'53" N., 124°22'48" W.; 43°23'42" N., 124°23'01" W.; 43°24'16" N., 124°23'26" W.; 43°24'05" N., 124°23'38" W.

(ii) *Size:* 0.13 square nautical mile.

(iii) *Depth:* Averages 55 meters.

(iv) *Primary Use:* Dredged material.

(v) Period of Use: Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material in the Coos Bay area of type 2 and 3, as defined in the site designation final EIS.

(5) Coquille River Entrance, OR.

(i) *Location:* 43°08'26" N., 124°26'44" W.; 43°08'03" N., 124°26'08" W.; 43°08'13" N., 124°27'00" W.; 43°07'50" N., 124°26'23" W. Centroid: 43°08'08" N., 124°26'34" W.

(ii) *Size:* 0.17 square nautical miles.

(iii) *Depth:* 18.3 meters.

(iv) *Period of Use:* Continuing use.

(v) *Restrictions:* Disposal shall be limited to dredged material from the Coquille Estuary and River and adjacent areas.

(6) Mouth of Columbia River, OR/WA Dredged Material Site A.

(i) *Location:* 46°13'03" N., 124°06'17" W.; 46°12'50" N., 124°05'55" W.; 46°12'13" N., 124°06'43" W.; 46°12'26" N., 124°07'05" W.

(ii) *Size:* 0.27 square nautical mile.

(iii) *Depth:* Ranges from 14–25 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Columbia River entrance channel and adjacent areas.

(7) Mouth of Columbia River, OR/WA Dredged Material Site B.

(i) *Location:* 46°14'37" N., 124°10'34" W.; 46°13'53" N., 124°10'01" W.; 46°13'43" N., 124°10'26" W.; 46°14'28" N., 124°10'59" W.

(ii) *Size:* 0.25 square nautical mile.

(iii) *Depth:* Ranges from 24–39 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Columbia River entrance channel and adjacent areas.

(8) Mouth of Columbia River, OR/WA Dredged Material Site E.

(i) *Location:* 46°15'43" N., 124°05'21" W.; 46°15'36" N., 124°05'11" W.; 46°15'11" N., 124°05'53" W.; 46°15'18" N., 124°06'03"W.

(ii) *Size:* 0.08 square nautical mile.

(iii) *Depth:* Ranges from 16–21 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Columbia River entrance channel and adjacent areas.

(9) Mouth of Columbia River, OR/WA Dredged Material Site F.

(i) *Location:* 46°12'12" N., 124°09'00" W.; 46°12'00" N., 124°08'42" W.; 46°11'48" N., 124°09'00" W.; 46°12'00" N., 124°09'18" W.

(ii) *Size:* 0.08 square nautical mile.

(iii) *Depth:* Ranges from 38–42 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restriction:* Disposal shall be limited to dredged material from the Columbia River entrance channel and adjacent areas.

(10) Grays Harbor Eight Mile Site.

(i) *Location:* Circle with a 0.40 mile radius around a central coordinate at 46°57' N., 124°20.06' W.

(ii) *Size:* 0.5 square nautical miles.

(iii) *Depth:* 42–49 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of Use:* One time use over multiple years. Designation of the site is anticipated within five years following completion of disposal and monitoring activities.

(vi) *Restrictions:* Disposal shall be limited to dredged material from initial construction of the Grays Harbor navigation project. Post-disposal monitoring will determine the need and extent of closure requirements.

(11) Grays Harbor Southwest Navigation Site.

(i) *Location:* 46°52.94' N., 124°13.81' W; 46°52.17' N., 124°12.96' W.; 46°51.15' N., 124°14.19' W.; 46°51.92' N., 124°14.95' W.

(ii) *Size:* 1.25 square nautical miles.

(iii) *Depth:* 30–37 meters (average).

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material determined to be suitable for unconfined disposal from Grays Harbor estuary and adjacent areas. Additional discharge restrictions will be contained in the EPA/Corps management plan for the site.

(12) Nome, AK—East Site.

(i) *Location:* 64°29'54"N., 165°24'41"W.; 64°29'45"N., 165°23'27"W.; 64°28'57"N., 165°23'29"W.; 64°29'07"N., 165°24'25".

(ii) *Size:* 0.37 square nautical mile.

(iii) *Depth:* Ranges from 1 to 12 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Nome, Alaska, and adjacent areas. Use will be coordinated with the City of Nome prior to dredging.

(13) Nome, AK—West Site.

(i) *Location:* 64°30'04"N., 165°25'52"W.; 64°29'18"N., 165°26'04"W.; 64°29'13"N., 165°25'22"W.; 64°29'54"N., 165°24'45"W.

(ii) *Size:* 0.30 nautical miles.

(iii) *Depth:* Ranges from 1 to 11 meters.

(iv) *Primary use:* Dredged material.

(v) *Period of use:* Continuing use.

(vi) *Restrictions:* Disposal shall be limited to dredged material from Nome, Alaska, and adjacent areas. Use will be coordinated with the City of Nome prior to dredging. Preference will be given to placing any material in the inner third of the site to supplement littoral drift, as needed.

(o) Region X Final Other Wastes Sites.

(1) No final sites.

(2) [Reserved]

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Federal Register

Tuesday
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Part VI

Department of Education

34 CFR Part 600, et al.;
Institutional Eligibility; Student Assistance General Provisions; Federal Family Education Loan Programs; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 600, 668, and 682

RIN 1840–AB87, 1840–AB85 and 1840–AB80

Institutional Eligibility; Student Assistance General Provisions; Federal Family Education Loan Programs

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the Institutional Eligibility regulations, the Student Assistance General Provisions regulations, and the Federal Family Education Loan (FFEL) Program regulations to further implement changes in the Higher Education Act of 1965, as amended (HEA), and to improve the monitoring and accountability of institutions and third-party servicers participating in the student financial assistance programs authorized by Title IV of the HEA (Title IV, HEA programs). These regulations seek to improve the efficiency of Federal student aid programs and, by so doing, to improve their capacity to enhance opportunities for postsecondary education.

EFFECTIVE DATE: These regulations take effect on July 1, 1995, with the exception of § 668.9(b), which is effective as of July 1, 1994. However, affected parties do not have to comply with the information collection requirements in §§ 668.3, 668.8, 668.15, 668.16, 668.22, and 668.23 until the Department of Education publishes in the **Federal Register** the control numbers assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control numbers notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1980.

FOR FURTHER INFORMATION CONTACT: Wendy Macias or Greg Allen, U.S. Department of Education, 600 Independence Avenue, S.W. (Regional Office Building 3, Room 4318), Washington, D.C. 20202–5343. Telephone (202) 708–7888. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: On April 29, 1994 the Secretary published interim final regulations (denominated final regulations) amending the Student Assistance General Provisions regulations and the regulations for the Federal Family Education Loan Programs and the Federal Pell Grant Program (59 FR 22348). These regulations became effective on July 1, 1994. At the time these final regulations were published, the Secretary requested additional public comment on whether further changes in the regulations were warranted. A notice correcting the regulations and extending the comment period until July 28, 1994 was published on July 7, 1994 (59 FR 34964).

Based on the comments received, the Secretary is making further changes in the regulations. These changes will take effect July 1, 1995. The Secretary also received comments on other provisions of the regulations and may make further changes in the regulations based on these comments. However, if the Secretary determines that additional changes are necessary, these future changes would not become effective before July 1, 1996.

The Higher Education Amendments of 1992, Pub. L. 102–325, (the Amendments of 1992) and the Higher Education Technical Amendments of 1993, Pub. L. 103–208 (the Technical Amendments of 1993) amended the HEA in several areas relating to the participation of institutions in the Title IV, HEA programs. Further, the Amendments of 1992 amended the HEA to expand the Secretary's authority to regulate the activities of those individuals and organizations now called *third-party servicers*. The Student Assistance General Provisions regulations contain requirements that are common to educational institutions that participate in the Title IV, HEA programs.

The April 29, 1994 final regulations included a discussion of the major issues which will not be repeated here. The following list summarizes those issues and identifies the pages of the preamble to the April 29, 1994 final regulations on which a discussion of those issues can be found:

The Secretary clarified the terms used in the statutory definition of *academic year* (pages 22351 and 22361–22363);

The Secretary added a definition of *third-party servicer* as applicable to those individuals or organizations that contract with an institution to administer any aspect of the institution's participation in the Title IV, HEA programs (pages 22364–22365);

The Secretary amended the definition of an *eligible program* to implement statutory requirements, including requirements for "short-term" programs (at least 300 but less than 600 clock hours) that would be eligible for the FFEL programs only. The Secretary included methodologies for the measurement of completion and placement rates for short-term programs, as required by the statute. Also in accordance with the statute, the Secretary added further provisions to evaluate the quality of short-term programs. The Secretary also amended the provisions for English as a second language programs (pages 22351–22352 and 22365–22368);

The Secretary added two new sections to codify procedures with regard to applications to participate initially or to continue to participate in a Title IV, HEA program and procedures by which the Secretary certifies that an institution meets the standards in subpart B of these regulations and accordingly may participate in a Title IV, HEA program. The Secretary added procedures to codify new statutory provisions governing provisional certification procedures for participation in a Title IV, HEA program (pages 22352–22353 and 22368–22374);

The Secretary amended the regulations governing program participation agreements to include numerous new provisions added by the Amendments of 1992 and provisions previously prescribed by the HEA but not specifically spelled out in the regulations. The Secretary also added provisions to amend the regulations governing program participation agreements (pages 22353 and 22374–22377);

The Secretary made significant changes to the section governing the evaluation of an institution's financial responsibility. The Secretary strengthened the factors used to evaluate an institution's financial responsibility to reflect statutory changes (pages 22353–22354 and 22378–22383);

The Secretary strengthened and expanded the standards of administrative capability for participating institutions, addressing areas previously not regulated or for which there were only guidelines (pages 22354 and 22383–22391);

The Secretary amended the provisions governing default reduction measures to reflect statutory changes made by the Amendments of 1992 and current departmental practices (pages 22355 and 22391–22394);

The Secretary clarified the terms used in the statutory definition of a fair and equitable refund policy (pages 22355–22359 and 22394–22401);

The Secretary implemented the statutory requirement that institutions have annual compliance audits (pages 22359 and 22401–22403);

The Secretary expanded the factors of financial responsibility of an institution to take into consideration substantial control over both institutions and third-party servicers (page 22381);

The Secretary implemented annual audit requirements for third-party servicers as necessary to implement statutory provisions under the Amendments of 1992 (pages 22401–22403);

The Secretary amended the regulations to require a third-party servicer to notify any institution under whose contract the third-party servicer is assessed a liability and any institution that receives the same services for which a liability was assessed, of the assessment of the liability against the servicer (page 22408);

The Secretary created a new section to codify contract requirements between institutions and third-party servicers. As one of the conditions in the contract, a third-party servicer is required to assume joint and several liability with an institution that the servicer contracts with for any violation by the servicer of any Title IV, HEA program requirement (pages 22405–22407);

The Secretary amended the regulations to apply against a third-party servicer the sanctions under subpart G of the Student Assistance General Provisions for any violation of a Title IV, HEA program requirement (page 22408);

The Secretary amended the regulations to apply fiduciary standards to third-party servicers so that a third-party servicer is required to act at all times with the competency necessary to qualify as a fiduciary (pages 22408–22409);

The Secretary amended the regulations to require a third-party servicer that contracts with a lender or guaranty agency to assume joint and several liability for any violation of any FFEL program requirement or applicable statutory requirement. Collection of liabilities from the violation would be collected first from the lender or guaranty agency (page 22415);

The Secretary added a new section to codify Federal requirements for third-party servicers that contract with lenders or guaranty agencies. A third-party servicer is required to meet certain standards of financial responsibility and administrative capability to be considered eligible to contract with a lender or guaranty agency. In addition, this section implements statutory authority to require that a third-party servicer must have performed an annual audit of the servicer's administration of a lender's or guaranty agency's participation in the FFEL programs (pages 22415–22416); and

The Secretary amended the Federal Pell Grant Program regulations to implement section 487(c)(7) of the HEA that provides that an institution may offset the amount of Title IV, HEA program disbursements against liabilities or may receive reimbursement from the Department for those amounts if, in the course of any audit conducted after December 31, 1988, the Department discovers or is informed of any Title IV, HEA program assistance (specifically, Federal Pell Grant Program funds) that an institution has provided to its students in accordance with program requirements, but the institution has not previously received credit or reimbursement for these disbursements (pages 22416–22417).

Substantive Changes to the Final Regulations

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

Subpart A—General

Section 668.2 General Definitions

Academic Year

In the April 29, 1994 final regulations, the Secretary addressed an abuse of the definition of an *academic year* whereby an institution that has programs that are measured in credit hours without terms could claim that it meets the requirements for the minimum amount of work to be performed by a full-time student over an *academic year* by giving a full-time student a minimal amount of instruction over a 30-week (or more) period, which the institution claims to be equivalent to 24 semester or 36 quarter hours. A modification was made to require that, for educational programs using credit hours, but not using a semester, trimester, or quarter system, a week of instructional time is any week in which at least five days of regularly scheduled instruction, examinations, or preparation for examinations occurs, as opposed to one day of regularly scheduled instruction, examinations, or preparation for examinations for all other programs. In response to public comment, the Secretary has amended the definition of an academic year to require that, for educational programs using credit hours, but not using a semester, trimester, or quarter system, a week of instructional time is any week in which at least 12 hours of regularly scheduled instruction, examinations, or preparation for examinations occurs. A corresponding change has been made to the definition of an *eligible program* in § 668.8(b)(3)(ii). *Third-party Servicer.*

In response to public comment, the definition of third-party servicer has been amended to specifically exclude the function of providing computer services or software. This change merely codifies the Secretary's determination in the preamble to the April 29, 1994 final regulations, that the function of providing computer services or software is simply a technological means to assist in carrying out certain administrative functions that are already included in the definition third-party servicer under this part.

In response to public comment, the definition of third-party servicer has been modified to expressly exclude employees of an institution. For purposes of determining which individuals are employees of an institution, with respect to administering any aspect of an institution's participation in the Title IV, HEA programs, the regulations now specify that an employee is an individual that works on a full-time, part-time, or temporary basis at the institution; performs all required duties that are relevant to the administration of the institution's participation in the Title IV, HEA programs on site at the institution under the supervision of the institution; is paid as an individual directly by the institution; is not employed by or associated with a third-party servicer; and is not a third-party servicer for any other institution.

Section 668.3 Reductions in the Length of an Academic Year.

In the April 29, 1994 final regulations, the Secretary promulgated regulations to implement the technical amendment that provided that the Secretary may reduce, for good cause on a case-by-case basis, the required minimum of 30 weeks of instructional time to not less than 26 weeks of instructional time in the case of an institution of higher education that provides a 2-year or 4-year program of instruction for which it awards an associate or baccalaureate degree. In response to public comment the Secretary has amended § 668.3(c) to clarify that an institution may apply for a longterm reduction in the length of an academic year if it wishes to continue operating with a reduced academic year on a longterm basis. An institution's other option would be to ask for a temporary reduction in the length of an academic year while the institution changes to at least a 30 week academic year. The Secretary notes that § 668.3(c)(2) requires an institution that is granted a longterm reduction in the length of an academic year to reapply to the Secretary in order to continue the reduction whenever the institution is

required to apply to continue to participate in a Title IV, HEA program.

The April 29, 1994 final regulations require that an institution applying for a transitional or longterm reduction in the length of an academic year must demonstrate that the institution has awarded, disbursed, and delivered Title IV, HEA program funds in accordance with the academic year requirements in section 481(d) of the HEA since July 23, 1992, as the requirements became applicable to the various Title IV, HEA programs. In response to public comment, the Secretary has added § 668.3(d) to specify that an institution may demonstrate compliance with this requirement by making arrangements that are satisfactory to the Secretary to repay any overawards that resulted from the improper awarding, disbursing, or delivering of Title IV, HEA program funds.

Section 668.8 Eligible Program

English as a Second Language (ESL)

In response to public comment, the Secretary has removed § 668.8(j)(2) that required an institution to assess each student at the end of an ESL program to substantiate that the student has attained adequate proficiency in written and spoken English to use already existing knowledge, training, or skills.

Undergraduate Educational Program in Credit Hours.

In response to public comment, the clock-hour/credit-hour conversion regulations have been amended to reinstate the exemption from the clock-hour/credit-hour conversion formula for programs of at least two academic years in length that lead to an equivalent degree, as determined by the Secretary. A similar change has been made for programs offered by an institution that are fully creditable toward that institution's equivalent degree, as determined by the Secretary.

Section 668.9 Relationship Between Clock Hours and Semester, Trimester, or Quarter Hours in Calculating Title IV, HEA Program Assistance

On October 20, 1994, Pub. L. 103–382 was signed by the President of the United States. Pub. L. 103–382 amends the HEA to specify that public or private nonprofit hospital-based diploma schools of nursing are exempt from any regulations promulgated by the Department concerning the relationship between clock hours and semester, trimester, or quarter hours in calculating student grant, loan, or work assistance under Title IV of the HEA. Accordingly, this section is amended to provide for that exemption. This provision took effect on July 1, 1994.

Subpart B—Standards for Participation in the Title IV, HEA Programs

Section 668.12 Application Procedures

In response to public comment, the Secretary has revised § 668.12(b) to no longer automatically require an institution to apply to the Secretary for a certification that the institution continues to meet the standards for participation in the Title IV, HEA programs if the institution adds an additional location that offers 100 percent of a program. The regulations have been revised to require that if an institution adds an additional location that offers 100 percent of a program, the institution is required to notify the Secretary in accordance with 34 CFR 600.30. If the Secretary determines that the addition of the location may impair an institution's administrative capacity or financial strength, the Secretary may require the institution to apply to the Secretary for a certification that the institution continues to meet the standards for participation in the Title IV, HEA programs.

Section 668.15 Factors of Financial Responsibility

In response to public comment, the Secretary has revised the cash reserve requirement to provide that an institution will be deemed to have sufficient cash reserves to make refunds if the institution demonstrates that it meets the factors of financial responsibility in § 668.15 and demonstrates that it has paid refunds in a timely manner over a two-year period. If the institution does not demonstrate financial responsibility, the institution will have to post a letter of credit in accordance with existing regulations. If the institution did not demonstrate timely payment of refunds, the institution will have to post a letter of credit equal to 25 percent of the Title IV refunds it was required to make over the past year.

Based upon the change in requirements for the cash reserve related to refund payments set out in 668.15, the Secretary has amended §§ 668.15(b)(7)(i)(A) and (8)(i)(B) to remove the reference to the cash reserve fund in the delineation of items that would be included in the list of institutional assets for the acid test analysis.

The Secretary has also amended the language in 668.15(b)(7)(i)(B) to clarify that the determination of an institution's financial responsibility depends, in part, upon an analysis of the relative size of an institution's net operating losses over the prior two year period. This clarification is being made to reflect the discussion on 59 FR 22382 of the April 29 final regulations, where the Secretary explained that an analysis of an institution's operating losses was made to determine if the losses in either or both of the institution's two most recently completed fiscal years in sum total more than ten percent of the institution's total net worth at the beginning of the first year in the two year period.

The Secretary has amended § 668.16(d) to delineate items that the Secretary will consider in determining whether a State tuition recovery fund is an acceptable substitute for the federal cash reserve requirement.

Section 668.16 Standards of Administrative Capability

In response to public comment, the Secretary has modified the provisions governing satisfactory academic progress in § 668.16(e) to provide clarification.

In response to public comment, the Secretary has revised § 668.16(l) that required that, to be administratively capable, an institution was required to meet the 33 percent withdrawal rate specified in the regulations. This provision is now applicable only to institutions that seek to participate in a Title IV, HEA program for the first time ("new" schools). The Secretary has also changed the withdrawal date provision to require institutions to report their withdrawal rates for an award year time period, rather than an academic year time period.

Section 668.22 Institutional Refunds and Repayments

Section 668.22(a)(1) has been amended to clarify that the requirement that an institution have a fair and equitable refund policy under which the institution makes a refund of certain charges to a student who received Title IV, HEA program assistance, includes any student whose parent received a Federal Direct PLUS loan on behalf of the student. In addition, § 668.22(i) has been amended to clarify that "financial aid" includes Federal Direct PLUS loans received on the student's behalf.

In response to public comment, changes have been made to remove language that would have required an institution to treat a student on a leave of absence as a withdrawal for purposes of this section. Language has been removed from §§ 668.22(a)(1)(ii), (e)(1)(i), and (g)(2)(iv) of the April 29, 1994 final regulations to reflect this change. Section 668.22(j)(1)(ii) has been

amended to define the withdrawal date for a student who does not return to the institution at the expiration of an approved leave of absence or takes a leave of absence that is not approved, as the student's last recorded date of class attendance as documented by the institution. Section 668.22(j)(2) has been added to specify that a leave of absence is approved for purposes of this section if no other leave of absence has been granted within a twelve-month period, the leave of absence does not exceed 60 days, the student makes a written request to be granted the leave of absence, and the leave of absence does not involve additional charges by the institution to the student. Section 668.22(j)(4)(iii)(A) has been amended to require that an institution pay a refund that is due to a student who does not return to the institution at the expiration of an approved leave of absence, within 30 days of the date of expiration of the leave of absence. Section 668.22(j)(4)(iii)(B) has been added to require that an institution pay a refund that is due to a student who is taking an unapproved leave of absence, within 30 days after the student's last recorded date of class attendance as documented by the institution.

In response to public comment, § 668.22(b)(1)(iv)(A) has been amended to reflect that the Secretary has removed Appendix A to this part, Standards for Acceptable Refund Policies by Participating Institutions, and replaced it with the Federal refund calculation described in new § 668.22(d).

Sections 668.22(c)(2)(ii) and 668.22(g)(2)(ii)(B) permit an institution to exclude allowable late disbursements of loans made under the Federal Direct Student Loan Program from a student's scheduled cash payment. These sections have been amended to clarify that late disbursements of loans made under the Federal Direct Student Loan Program must be made in accordance with 34 CFR 685.303(d) of the Federal Direct Student Loan Program regulations.

In response to public comment, § 668.22(e)(i) has been amended to define the minimum "period of enrollment for which the student has been charged" as the semester, trimester, quarter, or other academic term in the case of an educational program that is measured in credit hours or clock hours and uses semesters, trimesters, quarters, or other academic terms. Section 668.22(e)(ii) has been amended to define the minimum "period of enrollment for which the student has been charged" in the case of an educational program that is measured in credit hours or clock hours and does not use terms and is longer than or equal to the academic year in length, as the greater of the payment period or one-half of the academic year. Section 668.22(e)(ii) is also amended to define the minimum "period of enrollment for which the student has been charged" in the case of an educational program that is measured in credit hours or clock hours and does not use terms and is shorter than the academic year in length, as the length of the educational program.

Section 668.22(f)(1)(ii), (f)(2)(i), (g)(3)(ii), (h)(1), (h)(2)(ii) and (h)(2)(v) have been amended to clarify that, for purposes of this section an institution is not required to determine whether a student has received an overpayment and, therefore, is not required to return any amount of a repayment, for noninstitutional costs for Federal Direct Stafford, or Federal Direct PLUS program funds. This is consistent with requirements for Federal Work Study (FWS), Federal Stafford loan, Federal PLUS, and Federal SLS program funds.

In response to public comment, § 668.22(g)(3)(iii)(B) has been added to provide that an institution does not have to pay a refund if the institution demonstrates that the amount of a refund would be $25 or less, provided that the institution has obtained written authorization from the student in the enrollment agreement to retain any amount of the refund that would be allocated to the Title IV, HEA loan programs.

Consistent with the allocation order for the return of unsubsidized and subsidized Federal Stafford loans, § 668.22(h)(1)(v) has been added and § 668.22(h)(1)(vi) has been amended to clarify that an institution must allocate a refund to eliminate outstanding balances on unsubsidized Federal Direct Stafford loans received by the student before allocating any portion of the refund to eliminate outstanding balances on subsidized Federal Direct Stafford loans received by the student.

Section 668.22(j)(3) has been amended to clarify that this paragraph specifies the timely determination of withdrawal *for students who drop out* of an institution. It is unnecessary to specify the timely determination of a student's withdrawal in the case of students who officially withdraw, are expelled, or take an unapproved leave of absence, because the institution has either been informed of the withdrawal, or has taken action to withdraw the student. Further, the Secretary would expect an institution to be aware that a student has failed to return from an approved leave of absence on the day that the student is scheduled to return to the institution.

In order to provide further guidance on the refund process, the Secretary has included flow charts that demonstrate the basic procedures for determining which refund policy to use and general guidance on how to calculate refunds. These flow charts are located in a new Appendix A to this part (Flow Charts for Procedures for Calculating Refunds Under § 668.22).

Section 668.23 Audits, Records, and Examinations

References to a foreign institution have been removed from this section to clarify that an institution, as that term is used throughout the regulations, includes a foreign institution, as defined in 34 CFR 600.52, unless otherwise specified.

In response to public comment, § 668.23(c)(1)(i) and (iii) have been amended to specify that a third-party servicer's annual compliance audit must meet the compliance audit standards for institutions. This change reflects the Secretary's determination that a third-party servicer, as an agent of an institution, must be examined with the same standards that are applied to institutions.

The Secretary is making a technical change to § 668.23(c)(1)(iv) and (d) to specify that the U.S. General Accounting Office's publication concerning general standards and standards for compliance audits is now published under the title: *Government Auditing Standards.*

In response to public comment, a foreign institution's first audit report is only required to cover the two most recently concluded award years in which the foreign institution participated in the Title IV, HEA programs, unless otherwise specified by the Secretary. If a foreign institution has been participating in the Title IV, HEA programs for less than two award years, the foreign institution's first audit report must cover the entire period of time since the foreign institution began to participate in the Title IV, HEA programs. This change to the final regulations that were published on April 29, 1994, reduces the burden that is placed upon a foreign institution that has been participating in the Title IV, HEA programs for a long time. A new § 668.23(c)(2)(i)(B) incorporates this change.

In response to public comment, § 668.23(c)(3) has been revised to require that an institution's or third-party servicer's annual compliance audit must be based upon the award year and submitted to the Department of Education within six months after the end of the institution's or third-party

servicer's fiscal year that ends on or after the most recently concluded award year for which the audit is performed. A corresponding change has also been made to new § 668.23(c)(2)(i)(B) and to § 668.23(c)(2)(ii).

In response to public comment, § 668.23(h)(1)(v), which required an institution to document a Title IV, HEA program recipient's placement in a job, if the institution had a placement service and the student used that service, has been removed. In addition, § 668.23(h)(2) (i) and (ii), which require an institution to establish and maintain records regarding the admission requirements and educational qualifications of each regular student the institution admits into an eligible program, have been combined under § 668.23(h)(2) to simplify the regulations.

Subpart G—Fine, Limitation, Suspension and Termination Proceedings

Section 668.81 Scope and Special Definitions

Under the State Postsecondary Review Program (SPRP) authorized under Part H–1 of Title IV of the HEA, a State Postsecondary Review Entity (SPRE) reviews institutions referred to a State to determine if the referred institutions meet applicable State standards. If a SPRE determines, after affording an institution the opportunity to contest that determination, that an institution should no longer participate in the Title IV, HEA programs because it violates state standards, it notifies the Secretary of that determination. Under 34 CFR 667.26(b)(2) of SPRP regulations, the institution is not allowed to appeal that termination determination to the Secretary.

Upon receipt of that notice, the Secretary immediately terminates the institution's participation in the Title IV, HEA programs. Accordingly, § 668.81 is amended to clarify that Subpart G of Part 668 does not apply to terminations under the SPRP.

Subpart H—Appeal Procedures for Audit Determinations and Program Review Determinations

Section 668.116 Hearing

The Secretary has also made a typographical correction to 668.116(e)(1)(vi) to reflect that institutions and third party servicers have up to 30 days following the filing of a request for review of an audit determination or a program review determination to file certain other records and materials to be considered in conjunction with their request. The April 29, 1994 final regulations contained a typographical error that defined this period as "3" days rather than the "30" days established for such documentary submissions.

PART 682—FEDERAL FAMILY EDUCATION LOAN PROGRAMS

Subpart D—Guaranty Agency Programs

Section 682.413 Remedial Actions

The April 29, 1994 regulations applied the remedial actions of this section to a third-party servicer that contracts with a lender or guaranty agency to administer any aspect of the lender's or agency's FFEL programs. However, the final regulations did not specify that a third-party servicer was entitled to an opportunity to be heard prior to the assessment of any remedial actions that the Secretary deems are appropriate to the alleged violation. Accordingly, § 682.413(e)(1) is amended to provide third-party servicers that contract with lenders or guaranty agencies with an opportunity to present evidence or other information as to why the remedial action should not be levied against the servicer. This change provides due process protection for third-party servicers that contract with lenders or guaranty agencies.

Analysis of Comments and Changes

In response to the Secretary's invitation in the April 29, 1994 final regulations, 706 parties submitted comments. An analysis of the comments that have resulted in changes to the final regulations follows.

Major issues are grouped according to subject, with appropriate sections of the regulations referenced in parenthesis. Other substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority are not addressed (unless the Secretary believes it is necessary to do so.)

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

Subpart A—General

Section 668.2 General definitions

Academic Year

Comments: Eighty-seven commenters commented on the Secretary's definition of a week of instructional time for purposes of the definition of an *academic year* and a week of instruction for purposes of the definition of an *eligible program* in § 668.8. A few commenters asked for clarification on the implementation of the five-day rule. One commenter suggested that the Secretary clarify the definition of a week of instruction, because a strict reading of the language implies that an institution would not be able to count as a week of instruction any week in which there was not a full five days of instruction due to a holiday, teacher workshop day, etc. Some commenters were concerned that this provision would require their students to make-up time for Federal holidays. One commenter observed that given that there are approximately 12 Federal holidays per year, even a nine-month program which meets five days per week would not be deemed to have 30 weeks of instruction under the current definition of an academic year. One commenter expressed concern that its institution would have to eliminate a monthly inservice, during which meetings, tutoring sessions, and professional lectures are conducted. Another commenter stated that the State of Maryland would not permit them to reduce the number of hours per day in order to add a fifth day of class. The institution was concerned that under this provision, its students who attend their weekend program would be ineligible for Title IV, HEA program assistance. Another commenter requested that the Secretary define a day of instruction, examination, or preparation.

Many commenters were concerned that requiring students to attend classes at least five days per week if the students are attending educational programs measured in credit hours without semesters, trimesters, or quarters, would create time and economic hardships. The commenters said the schedules of these programs are tailored to meet the needs of non-traditional students who have family and work obligations which require flexible school schedules. Many commenters believed that under this provision, students would encounter decreased wages and increased child care costs if they were required to spend extra days in class. Some commenters stated that this rule would only contribute to student absenteeism. Other commenters argued that this provision would work as a disincentive for some students to attend these programs and would serve as an agent in cutting off equal access to students who cannot attend classes five days a week. Some commenters feared that this rule would have a substantially negative impact on enrollment at their institutions. One commenter stated that he specifically chose his program of study because it allowed flexibility in attending classes

and retaining his job, and this provision would prohibit him and many other students from pursuing their education and employment opportunities. Some commenters maintained that students who travel to institutions for intensified weekend programs would be severely impacted by this provision, as they would incur greater transportation and lodging costs. Some commenters viewed the provision as discriminatory, as it would limit educational access for some students. One of the commenters observed that traditional education is not effective in low-income, single-parent households. A few commenters believed that the Secretary did not take into account the rationale for the use of non-standard terms. These institutions offer more starts with less students so that staff can better assist students with placement upon completion of the program.

Some commenters remarked that while the current definition addresses the required minimum of days per week, it disregards the number of hours per day. Many commenters felt that the Secretary should focus on the amount of daily instructional time rather than the number of days per week spent in the classroom. The commenters questioned the relationship between the number of days a student attends classes and the quality of a program, especially if the regulation does not recognize the length of time a student spends in class per day. One commenter suggested that the Secretary define its 30-week academic year as any period of at least 30 chronological weeks, i.e., 210 days, in which at least 720 clock hours of instruction is scheduled to occur. This methodology translates to requiring scheduled attendance of at least 24 hours of attendance per week for a full-time student and is consistent with the Department's long-standing definition of full-time status. The commenter noted that given that non-fixed term institutions frequently have weekly or bi-weekly starts which could make it difficult for auditors to determine exactly where vacations and/or other activities not related to class preparation might fall, this proposal is more easily audited since the program reviewer or auditor would simply need to look at the program curriculum to determine the total number of classroom hours of instruction within the period. The commenter maintained that this proposed change is consistent with the Department's historical definition of full-time status, is easier to audit, satisfies current clock-hour/credit-hour conversion requirements, and is less administratively burdensome than the definition in the final rule. One commenter believed the effective date and the timeframe allowed for institutions to comply with this regulation was too stringent. The commenter felt that institutions and students should be given sufficient time to rearrange their schedules based on the changes necessitated by this requirement.

Discussion: The Secretary would like to clarify the Department's interpretation of the five-day rule under the regulations in effect for the 1994–95 award year as it applies to programs which measure progress in credit hours but do not use standard terms (semesters, trimesters, or quarters). A proprietary institution of higher education or a postsecondary vocational institution must, to be eligible, provide an eligible program, as defined by § 668.8(d) of the Student Assistance General Provisions regulations. Section 668.8(d) provides for three types of eligible programs for these institutions which require a program to have a specified number of weeks of instruction (see § 668.8(d) (1), (2), and (3)). In addition, each participating institution is subject to a definition of an academic year in which a full-time student (with respect to an undergraduate course of study), during a minimum of 30 weeks of instructional time, must complete a specified amount of work.

For purposes of these definitions of an eligible program and an academic year, for all educational programs measured in credit hours without standard terms (semesters, trimesters, or quarters), a "week of instruction" and a "week of instructional time" must include at least five days of instruction, examinations, or preparation for examinations within a consecutive seven-day period, as opposed to the required one day of instruction, examinations, or preparation for examinations per seven day period for all other programs.

The five-day rule in effect requires an institution to demonstrate that certain programs and academic years for those programs have not only a minimum number of weeks, but also a minimum number of days. For example, in order for a program to meet the eligible program definition that requires at least 600 clock hours, 16 semester or trimester hours or 24 quarter hours of instruction, examinations, or preparation for examinations offered during a minimum of 15 weeks, the program must meet for a minimum of 15 weeks *over which a minimum of 75 days of instruction*, examinations, or preparation for examinations *occur* (five days of instruction, examinations, or preparation for examinations for 15 weeks).

An institution that wants to set its program to be only 15 weeks long would therefore have to meet an average of five days per week for the 15 week period in order for the program to be eligible. An institution with a program that meets less frequently than five days a week would have to meet enough weeks to provide 75 days of instruction, examinations, or preparation for examinations. For example, a program meeting three times a week would have to be 25 weeks long in order to be eligible under this provision.

This same approach is used to determine an institution's academic year. An institution that wants to set its academic year to be only 30 weeks long would have to meet an average of five days per week for the 30 week period. An institution with a program that meets less frequently than five days a week would have to meet enough weeks to provide 150 days of instruction, examinations, or preparation for examinations (30 weeks x five days per week) in order to have a program offered over a full academic year. For example, a program that meets four times a week would have a full academic year of approximately 38 weeks (37 weeks x four days per week (plus an additional 2 days) = 150 days of instruction, examinations, or preparation for examinations). An institution has the option of pro rating Title IV, HEA program aid disbursements if it chooses to offer an eligible program over a period of time less than an full academic year.

The Secretary believes that this interpretation addresses many of the concerns of the commenters, as it does not require an institution to restructure a program to schedule five days of classes per week or a student to be in attendance five days per week. This interpretation allows an institution to establish a class schedule that meets the needs of its student population, while ensuring that the student is provided with a sufficient amount of education. The Secretary does not specify what constitutes a day of instruction, examination, or preparation for examination. However, the Secretary would expect an institution to be able to demonstrate that the amount of instruction, examinations, or preparation for examinations offered or required is reasonable and necessary for completion of the program.

The Secretary agrees with the commenters who noted that it would be more appropriate for the current definitions of a week of instructional time and a week of instruction to take

into account the hours of education offered to students each week, rather than the days of education offered each week. In particular, the Secretary agrees with the commenter who suggested that the Secretary define an academic year in a manner that relates to the amount of work that a full-time student is expected to perform over this period. To this end, the Secretary has decided to modify the definition of an *academic year* and an *eligible program* beginning with the 1995–96 award year to require that, for educational programs using credit hours, but not using a semester, trimester, or quarter system, a week of instructional time (and a week of instruction) is any week in which at least 12 hours of regularly scheduled instruction, examinations, or preparation for examinations occurs. The Secretary believes that a minimum number of hours, as opposed to a minimum number of days per week, will permit even greater flexibility to institutions that seek to provide education to nontraditional students. The Secretary believes that 12 hours per week is a reasonable measure, since full-time students are expected to carry a minimum of 12 semester or quarter hours per academic term in an educational program using a semester, trimester, or quarter system. Thus, full-time students enrolled in such programs are generally assumed to be in class attendance at least 12 hours per week, and this hourly requirement has been adopted to replace the five day rule to measure program eligibility. This provision is to be implemented in the same manner as the five-day rule provision. For example, in order for a program to meet the eligible program definition that requires at least 600 clock hours, 16 semester or trimester hours or 24 quarter hours of instruction, examinations, or preparation for examinations offered during a minimum of 15 weeks, the program must meet for a minimum of 15 weeks *over which a minimum of 180 hours of instruction*, examinations, or preparation for examinations *occur* (12 hours of instruction, examinations, or preparation for examinations per week for 15 weeks). An institution that wants to set its program to be only 15 weeks long would therefore have to meet an average of 12 hours per week for the 15 week period in order for the program to be eligible. An institution with a program that meets less frequently than 12 hours per week would have to meet enough weeks to provide 180 hours of instruction, examinations, or preparation for examinations. For example, a program meeting 6 hours per week would have to be 30 weeks long in order to be eligible under this provision.

Because neither the current five-day rule nor the 12-hour per week provision requires an institution to offer instruction, examinations, or preparation for examinations on specific days, an institution may not include a holiday for these calculations unless regularly scheduled instruction, examinations, or preparation for examinations occurs on that day.

Because the interpretation detailed above does not require an institution to restructure a program to meet 5 days per week, the Secretary does not agree that it was necessary to delay implementation of this requirement.

Changes: The definition of an *academic year* has been amended to require that, for educational programs using credit hours, but not using a semester, trimester, or quarter system, a week of instructional time is any week in which at least 12 hours of regularly scheduled instruction, examinations, or preparation for examinations occurs. A corresponding change has been made to the definition of an *eligible program* in § 668.8(b)(3)(ii).

Comments: One commenter observed that many external degree and adult learning programs are trying to reduce the number of days spent in the classroom. One commenter requested that the Secretary utilize the diversity and plurality of the education system by recognizing the amount of time the student spends in different educational settings. One commenter remarked that although instruction does not include periods of orientation or counseling, that is the time when some schools perform their required entrance loan counseling.

Discussion: The Secretary agrees that internships, cooperative education programs, independent study, and other forms of regularly scheduled instruction can be considered as part of an institution's academic year. Orientation programs and counseling do not provide educational instruction related to class preparation or examination and must not be included in determining the length of an academic year.

Changes: None.

Comments: Some commenters were confused as to the specific abuses that the Secretary is attempting to curb with the five-day rule. A few commenters disagreed with the Secretary's rationale that credit hour non-term programs are more susceptible to abuse than a traditional academic program. Many of the commenters believed that the 30-week academic year and the clock-hour/credit-hour conversion provisions have adequately dealt with this situation. One commenter requests that the Secretary demonstrate how it is possible to abuse the current definition and still meet the requirements for clock-to-credit-hour conversions. Several commenters believed that this provision is unnecessary, as the abuses that the Secretary is trying to curb with this rule are already addressed by other existing provisions (for example: certification gatekeeping functions contained in the HEA; State requirements which specify hours of instruction or academic calendars which consider class attendance on a daily or weekly basis; accrediting agencies which are required to look at the relationship between tuition and program length as it relates specifically to vocational training; and the SPRE standards). The commenters feel that the public would be better served by relying on existing regulations relating to program length, rather than requiring five days of instruction per week. A few commenters did not understand why its program met the program contact hours requirements of its accrediting agency, yet did not comply with the Department's regulations. One commenter requested clarification of the Secretary's policy of requiring accreditation of an institution for oversight, but not accepting verification by these accrediting agencies that an institution's programs are educationally sound.

Some of the commenters noted that this provision was not addressed in the February 28, 1994 notice of proposed rulemaking or during negotiated rulemaking and there was no opportunity to comment on this provision until publication of the final rule. Some commenters argued that the Department is exceeding its statutory authority, as Congress did not define this provision during reauthorization. One of these commenters believed there was no indication in the proposed rule that non-standard term programs would be singled out for discriminatory treatment in the definition of an academic year. The commenter understood that although the Secretary indicated he was concerned about assuring no opportunities for abuse by these programs, he made that statement in the context of the possible need to establish a standard workload for a full-time student; not in the context of making changes to the definition of an *academic year* and an *eligible program*. Many of the commenters believed that this provision is prejudicial against credit hour institutions without terms, and suggested that the Secretary apply the same definition of a week of

instruction to all institutions. One commenter was concerned that the regulation treats programs that have a term, but a term that is not a semester, trimester or quarter, the same as "nonterm" programs. Another commenter felt that the interests of the four-year institutions were better represented than the nonterm institutions which would be more impacted by this provision. One commenter noted that the Secretary has made an exception for programs that lead to associate, bachelor, or professional degrees, but not for nondegree programs.

Discussion: As stated in the February 28, 1994 NPRM and the April 29, 1994 final regulations, the Secretary is correcting an abuse of the definition of an *academic year* whereby an institution that has programs that are measured in credit hours without standard terms could claim that it meets the requirements for the minimum amount of work to be performed by a full-time student over an academic year by giving a full-time student a minimal amount of instruction over a 30-week (or more) period, which the institution claims to be equivalent to 24 semester or 36 quarter hours. The Secretary believes that provisions that address this area of abuse are appropriate in the regulations to prevent institutions from establishing elongated instructional schedules that do not require an appropriate workload throughout that period for a full-time student. Institutions offering credit hour programs without standard terms have more flexibility in shifting the workload requirements for their programs over an indefinite period than do clock hour programs or credit hour standard term programs. The Secretary believes that it is appropriate to establish minimum instructional periods that must be used for students attending these institutions. No corresponding changes need to be made where students are already required to receive a minimum amount of clock hours of training per week to be full-time students, or where the institution has fixed standard terms.

It is the Secretary's responsibility, and not an institution's accrediting agency, to utilize the definitions of an *academic year* and an *eligible program* in the HEA to ensure that appropriate amounts of Title IV, HEA program funds are disbursed to students. The Secretary does not believe that other provisions of the HEA or of the regulations address the specific area of abuse that this provision addresses. Although the clock-hour/credit-hour provision provides some protection against course structuring where an insufficient quantity of instruction is offered to support the academic credits assigned to the program, it does not prevent an institution from stretching the length of an educational program to conform to the minimum number of weeks required without offering an appropriate quantity of instruction during each of those weeks. Further, the Secretary notes that there are programs that must meet the statutory minimum number of weeks under the academic year and eligible program definitions that are not subject to the clock-hour/credit-hour regulations. For example, a training program in which each course is fully acceptable toward the institution's associate degree would be exempt from the clock-hour/credit-hour provision.

The Secretary notes that the February 28, 1994 NPRM requested comment on whether a minimum full-time workload for students enrolled in these educational programs should be established to address this abuse. Several commenters agreed that this abuse should be addressed. Rather than changing the proposed definition of full-time student to require measurement of student workloads, the Secretary believes it is more beneficial to stem abuse in this area by modifying the definitions of an academic year and an eligible program to require a minimum amount of instruction per week for institutions that offer credit hour programs without terms.

The Secretary notes that the statute defines an *academic year* in terms of weeks of instructional time and certain eligible programs in terms of weeks. The statute does not apply these terms to the definitions of eligible programs that qualify an institution as an institution of higher education for purposes of the Title IV, HEA programs. For the reasons stated above, the Secretary believes it is necessary to define these terms in a manner that will protect Title IV, HEA program funds.

Changes: None.

Third-Party Servicer

Comments: Five commenters suggested, for the purposes of 34 CFR part 668, that the definition of third-party servicer in this section should only identify those functions relating to third-party servicers that contract with institutions (as opposed to those third-party servicers that contract with lenders and guaranty agencies) to provide third-party servicers and institutions a clear understanding of which provisions are applicable. The five commenters also suggested that the definition of third-party servicer should be limited to those activities that an institution is required to perform under its participation agreement with the Secretary. These commenters believed that such a limitation would result in services such as consulting, training, computer services, ability to benefit test publishers, and legal advice not being covered by these regulations. The five commenters recommended clarifying that administration of participation is limited to what is specified in the institution's participation agreement with the Secretary.

Discussion: The Secretary does not believe that additional clarification of the definition of third-party servicer is necessary in the form recommended by the commenters. Section 481(f) of the HEA specifies that a third-party servicer is an individual, State, or private, profit or nonprofit organization that enters into a contract with an eligible institution to administer, through either manual or automated processing, any aspect of the institution's participation in any Title IV, HEA program. A third-party servicer that contracts with an eligible institution to administer any aspect of the institution's participation in the Title IV, HEA programs is required to follow the provisions in 34 CFR part 668 that are applicable to third-party servicers. Under the program participation agreement that an institution signs to participate in the Title IV, HEA programs, the institution specifically agrees to abide by all rules and regulations pertaining to Title IV of the HEA. Therefore, the suggestion to limit the scope of the definition of third-party servicer to what is required under a program participation agreement would not narrow the scope of the definition of third-party servicer, and could result in confusion over the definition of third-party servicer.

Changes: None.

Comments: Five commenters contended that the function of processing student financial aid applications was ambiguous and needed further clarification or else should be removed. The commenters argued that the Free Application for Federal Student Aid (FAFSA) is sent to the central processor or Multiple Data Entry Processor (MDE) and the function therefore should not be covered by the regulations. In addition, the commenters recommended that if the Secretary kept the language, that processing student financial aid applications should be clarified to exclude non-Federal financial aid applications.

Five commenters recommended that the function of determining student eligibility and related activities should not include "related activities." The commenters argued that related

activities was too ambiguous a term and was highly subjective.

Five commenters recommended clarifying the function of certifying loan applications to not include guaranty agency or lender electronic processing of loan applications because, the commenters contended, these entities merely use data provided by an institution.

Five commenters were concerned that escrow agents, as that term is used pursuant to 34 CFR 682.408, would be considered to be third-party servicers under the definition of third-party servicer in 34 CFR part 668. The commenters recommended that the Secretary specifically exclude the function that escrow agents perform from the list of functions that the Secretary does not consider administration of the Title IV, HEA programs because, the commenters contended, an escrow agent disburses funds for a lender under the FFEL programs and not for an institution. In addition, the commenters argued that the function of receiving, disbursing, or delivering Title IV, HEA program funds should include clarification that disbursements of funds are those received by the institution from the Secretary or lender.

One commenter argued that the definition of a third-party servicer should include an attorney that is carrying out litigation activities on Title IV, HEA program loans. Two commenters recommended that a dollar threshold be established so as not to preclude services by local attorneys on a small number of accounts. Three commenters argued that attorneys should be excluded from the definition of a third-party servicer. The commenters pointed out that if attorneys are covered by these regulations that conflicts may arise between these regulations and other Federal and State rules and regulations governing the conduct of attorneys.

Five commenters recommended excluding data exchange functions from the list of functions that the Secretary does not consider administration of the Title IV, HEA programs. The commenters believed, for example, that the Student Loan Clearinghouse, which the commenters stated received and consolidated student enrollment data, should not be considered a third-party servicer because the company merely consolidates data for institutions, lenders, and guaranty agencies.

Eight commenters supported the Secretary's decision to not include computer services and software providers from the list of functions that the Secretary considers to constitute administration of the Title IV, HEA programs. Six of the commenters requested that the Secretary specifically exclude these services in the regulations. One commenter believed that the function of providing industry-specific software or service packages should be included in the list of functions that the Secretary considers to constitute administration of participation in the Title IV, HEA programs because flaws in these programs could result in huge liabilities for institutions using the software. However, the commenter also believed that computer software packages that are modifiable by the user should not be covered by the regulations.

One commenter recommended that alternate Electronic Data Exchange (EDE) destination points that serve only as an electronic conduit from the Central Processing System to an institution should be excluded from the definition of third-party servicer because this type of activity is not a function of administering an institution's participation in the Title IV, HEA programs.

Discussion: The Secretary does not agree with those commenters who recommended removing the function of processing financial aid applications. The Secretary believes that processing financial aid applications is of fundamental importance to the proper delivery of program funds authorized under Title IV of the HEA, and third-party servicers contracting to perform this type of administration of the Title IV, HEA programs must be held accountable for any violations caused by the servicer. The Secretary also believes that the definition of third-party servicer is sufficiently clear as applying only to the function of processing financial aid applications required by the Federal government for determinations by an institution of student eligibility under the Title IV, HEA programs.

The Secretary does not agree with those commenters that recommended modifying the function of determining student eligibility and related activities to exclude "related activities." The statute defines the functions of a third-party servicer as administration of any aspect of an institution's participation in any Title IV, HEA program. Since there was no contention among commenters that determining student eligibility was not a third-party servicer function and because the statutory definition of third-party servicer is sufficiently broad, the Secretary believes that the inclusion of "related activities," such as reviewing documents submitted as a result of student verification, assists public understanding that a related function of determining student eligibility is a third-party servicer activity and avoids the possibility of third-party servicers attempting to avoid the requirements of these regulations.

The Secretary agrees with commenters that the function of certifying loan applications by an institution or its third-party servicer should not include guaranty agency or lender electronic processing of loan applications. However, the Secretary does not believe that a change to the regulatory language is warranted because guaranty agency and lender involvement in the certification of loan applications under the FFEL programs is a routine practice of these entities and is monitored under the FFEL programs. The Secretary does not consider a guaranty agency or lender that electronically processes loan applications for the FFEL programs and performs its assigned role in the programs that the guaranty agency or lender participates in to be considered a third-party servicer of an institution under these regulations.

The Secretary does not agree with commenters that the function of an escrow agent, as that term is used pursuant to 34 CFR 682.408, should be added to the list of functions that the Secretary does not consider to be an administration of an institution's participation in the Title IV, HEA programs. Nor does the Secretary believe that the function of receiving, disbursing, or delivering Title IV, HEA program funds should be clarified to only include disbursements of funds that are received by the institution from the Secretary or lender. The Secretary believes that commenters have inadvertently misread the definition of third-party servicer under 34 CFR part 668 as including the functions of an escrow agent under 34 CFR 682.408. Under the definition of third-party servicer in 34 CFR part 668, a third-party servicer is an individual or a State or private, profit or nonprofit organization that enters into a contract with an eligible institution to administer, through either manual or automated processing, any aspect of the institution's participation in any Title IV, HEA program. Because an escrow agent under 34 CFR 682.408 contracts with an eligible lender or guaranty agency to administer aspects of the lender's or guaranty agency's FFEL programs and does not contract with an eligible institution, an escrow agent is a third-party servicer of a lender or guaranty agency and not of an institution and is considered to be a third-party servicer under the definition

of third-party servicer in 34 CFR part 682.

The Secretary generally agrees with those commenters who believed that attorneys should not be covered by the definition of a third-party servicer under these regulations. However, as noted in the discussion of comments in the final regulations published in the **Federal Register** on April 29, 1994, the Secretary, in promulgating the definition of third-party servicer, applied the definition to a list of functions relating to the administration of the Title IV, HEA programs, and therefore is not regulating or excluding distinct entities by their identity but rather the activities that individuals or organizations perform in contracting with institutions. Provision of legal advice or litigation activities are not included in these functions. However, it is possible that an attorney would be considered to be a third-party servicer under these regulations if the activity of the attorney, performed on behalf of an institution, constitutes administration of the Title IV, HEA programs. It is not appropriate to state that attorneys are never considered third-party servicers as that would permit services to escape oversight simply by being provided under attorney signatures or by non-attorneys working for attorneys or their law firms.

With respect to those commenters who recommended establishing a dollar threshold to exclude local attorneys providing services on a small number of accounts, the Secretary does not believe that such a limitation is justifiable in the face of the statutory definition of third-party servicer. The statute does not permit the Secretary to promulgate a monetary threshold for administration of Title IV, HEA program funds to determine whether or not an individual or organization is a third-party servicer administering those funds.

The Secretary disagrees with those commenters who recommended specifically excluding data exchange functions under the list of activities that the Secretary does not consider administration of the Title IV, HEA programs. The Secretary believes that data exchange is an overly broad term that encompasses a wide variety of services such as processing raw student eligibility data, determining completion rates, or transmission of prepared data. With such an encompassing reach, the Secretary cannot support excluding all data exchange from the oversight of third-party servicers by the Secretary that is afforded by these regulations.

The Secretary agrees with those commenters who supported the Secretary's decision to exclude computer software or service providers from the list of activities that the Secretary considers to constitute administration of an institution's participation in the Title IV, HEA programs. As explained in the discussion of comments in the final regulations that were published in the **Federal Register** on April 29, 1994, the Secretary believes that the function of providing computer software or services is simply a technological means to assist in carrying out certain administrative functions that are already included in the definition of third-party servicer in 34 CFR part 668. The Secretary also agrees with the commenters who believed that the function of providing computer software or services should be specifically excluded from the definition of third-party servicer in the list of functions that the Secretary does not consider to constitute administration of an institution's participation in the Title IV, HEA programs. Because the Secretary has already provided explanation in the discussion of comments in the final regulations published on April 29, 1994, in the **Federal Register**, the Secretary believes that it is appropriate to provide that exclusion in the regulations.

With respect to the commenter who recommended that alternate EDE destination points be excluded from the definition of third-party servicer in these regulations, the Secretary does not agree with the comment. It is the experience of the Secretary that alternate EDE destination points use the data that institutions provide to assist in the administration of the institution's participation in the Title IV, HEA programs. Alternate EDE destination points provide institutions with assurances that the data relayed from the institution to the alternate EDE destination point will be provided to the Central Processor without error. Therefore, it is the position of the Secretary that such a service should be under the oversight of these regulations since relaying electronic information to the Central Processor is an important function in the processing of Federal student financial assistance claims.

Changes: A change has been made. The definition of third-party servicer is amended to specifically exclude the function of providing computer software or services from what the Secretary considers to constitute the administration of an institution's participation in the Title IV, HEA programs.

Comments: Two commenters believed that temporary employees employed on-site at a campus under the complete supervision of an institution's financial aid administrator (FAA) to assist in the administration of an institution's participation in the Title IV, HEA program should not be considered to be a third-party servicer. Two commenters believed that "moonlighting" FAAs who contract with other institutions to assist in administering those institutions' participation in the Title IV, HEA program should not be considered to fall within the scope of the definition of third-party servicer. Another commenter recommended that individuals taking on small consulting activities should not be subject to the same stringent requirements as corporate consulting firms that manage financial aid offices for several institutions. Three commenters were concerned that employment contracts would fall within the scope of the definition of a third-party servicer thereby making employees that administer an institution's participation in the Title IV, HEA programs third-party servicers.

Discussion: The Secretary agrees with those commenters that believed that individuals employed on a temporary basis should not be considered to be third-party servicers. The Secretary recognizes that individuals who work full-time as financial aid administrators at one institution often moonlight and provide valuable assistance at other institutions during busy periods of the award year. The Secretary believes that these individuals can appropriately be considered as employees even if they are not paid as a regular salaried or hourly employee of the institution.

With respect to employees hired pursuant to specific employment contracts, the Secretary does not believe that such contracts trigger the third-party servicer requirements. The Secretary never intended that individuals employed by an institution in a capacity that involves the administration of any aspect of an institution's participation in the Title IV, HEA programs would be considered to be a third-party servicer. The Secretary, is concerned however, that a third-party servicer not be designated as an employee simply to avoid the requirements of these regulations. The Secretary, therefore, considers an individual engaged on a temporary basis to be an employee if the person performs all required duties that are relevant to the administration of the institution's participation in the Title IV, HEA programs on site at the institution under the institution's supervision, is paid directly by the institution, and is not employed by or associated with a third-party servicer and is not engaged as a third-party servicer at another institution. This

language is not intended to enable individuals who perform services for multiple institutions during an award year to avoid being considered a third-party servicer. The Secretary will in the future consider whether further regulation is required if the employee designation is abused.

Changes: Changes have been made. The definition of third-party servicer has been amended to clarify that employees of an institution are not considered to be third-party servicers. An individual is considered an employee of the institution if the individual works on a full-time, part-time, or temporary basis at the institution; performs all duties on site at the institution under the supervision of the institution; is paid as an individual directly by the institution; is not employed by or otherwise associated with a third-party servicer; and is not a third-party servicer for any other institution.

Section 668.3 Reductions in the Length of an Academic Year.

Comments: Four commenters asked the Secretary to clarify that on-going reductions, as opposed to transitional reductions, in the minimum length of an academic year are permitted. One commenter questioned when the two-year period began for transitional reductions in the minimum length of an academic year. One commenter did not understand how an institution could demonstrate that it has provided Title IV, HEA program funds to its students based on the academic year requirements in section 481(d) of the HEA since July 23, 1992, and also meet the requirement that an institution must have an academic year that is less than 30 weeks on the effective date of the regulations in order to obtain a transitional reduction. One commenter urged the Department to remove the requirement that an institution demonstrate that it has provided Title IV, HEA program funds to its students based on the academic year requirements in section 481(d) of the HEA since July 23, 1992. Another commenter did not believe that Congress or the Department intended to force institutions to prove retroactively that they had a 30-week academic year prior to publication of the regulations. The commenter noted that there was no way for an institution to "make amends" if the institution was not previously in compliance.

One commenter was pleased that the Secretary had clarified preliminary requirements for institutions requesting a reduction in the minimum length of an academic year. The commenter further commended the Secretary for providing that currently participating institutions may be granted a temporary reduction for a period not to exceed two years, if the institution demonstrates a commitment to change to a 30 week academic year. The commenter felt that it would be beneficial for the Secretary to provide examples of what "unique conditions" the Secretary would look for when evaluating an institution's request for a longterm reduction. One commenter felt that the Secretary should provide guidance regarding the basis for a denial of a reduction request. Specifically, the commenter questioned whether the Secretary will abide by the decision of the accrediting agency that the academic quality of the institution is satisfactory, or if and when he will contravene such a determination.

Discussion: The Secretary would like to clarify that there are two types of minimum academic year reductions for which an institution may apply. The first type is a transitional waiver. An institution may ask for a temporary reduction in the length of an academic year while the institution changes to a 30 week academic year. This transitional reduction may not exceed two years from the effective date of the April 29, 1994 final regulations (July 1, 1994). The second type is a longterm waiver. An institution may apply for a longterm reduction in the length of an academic year if it wishes to continue operating with a reduced academic year on a longterm basis. The Secretary notes, however, that § 668.3(c)(2) states that an institution that is granted a longterm waiver must reapply to the Secretary for a reduction each time the institution is required to apply to continue to participate in a Title IV, HEA program.

The Secretary notes that it is not inconsistent to require an institution to demonstrate that it has provided Title IV, HEA program funds to its students based on the academic year requirements in section 481(d) of the HEA since July 23, 1992, and also meet the requirement that an institution must have an academic year that is less than 30 weeks on the effective date of the regulations. An institution is permitted to have an academic year of less than 30 weeks, but may not make full payment of Title IV, HEA program funds. However, unless and until the institution is granted a reduction in accordance with these regulations, the institution must pro rate the amount of Title IV, HEA program assistance awarded to students in attendance based on the definition of an academic year found in section 481(d) of the HEA.

The Secretary believes that it is appropriate to require that an institution applying for a reduction in the length of an academic year demonstrate that the institution has awarded, disbursed, and delivered Title IV, HEA program funds in accordance with the academic year requirements in section 481(d) of the HEA since July 23, 1992, as the requirements became applicable to the various Title IV, HEA programs. As the statute clearly states that an institution may not be granted a reduction in the minimum length of academic year unless the institution applies to the Secretary for a reduction, and the Secretary grants a reduction, the Secretary expects that institutions with academic years of less than 30 weeks that have not been granted a reduction have been properly pro rating Title IV, HEA program assistance. The Secretary believes institutions must have made a good faith effort to comply with the requirements of the statute. The Secretary would like to clarify that an institution that is ineligible for a reduction because the institution did not properly award, disburse, or deliver Title IV, HEA program funds in the past may be eligible for a reduction if the institution makes arrangements that are satisfactory to the Secretary to repay any overawards that resulted from the improper awarding, disbursing, or delivering of Title IV, HEA program funds. The Secretary's experience to date has been that this liability amount has been insignificant.

In determining what constitutes "unique circumstances" that would justify the Secretary granting a longterm reduction, the Secretary may look at information such as whether an educational program has historically provided instruction in a non-traditional manner for less than 30 weeks in previous academic years and cost reduction to students. Upon further consideration, the Secretary has decided that program placement rates, completion rates or other educational outcomes may also be evaluated as part of the Secretary's determination. Other factors may qualify as unique circumstances that justify granting the institution's request, depending upon the context in which these factors are presented in a particular case.

The statute provides that a reduction may be granted by the Secretary for good cause on a case-by-case basis. Therefore, the Secretary, and not an institution's accrediting agency, is charged with ensuring that reductions in the academic year are granted in a manner that protects Title IV, HEA program funds. Although the Secretary agrees that approval by an institution's

nationally recognized accrediting agency or State body that authorizes the institution to provide postsecondary programs should be considered as a factor in determining good cause for granting a reduction, the Secretary does not believe that such approval on its own is sufficient reason for granting an institution's request, as such an approval will most likely not include all areas that the Secretary will look at to determine that a reduction is warranted. Other factors that should be taken into account include the number of hours of attendance and other coursework that a full-time student is required to complete in the academic year, and any unique circumstances that justify granting the institution's request.

Changes: Section 668.3(c) has been amended to clarify that an institution may apply for a longterm reduction in the length of an academic year if it wishes to continue operating with a reduced academic year on a longterm basis. Section 668.3(d) has been added to specify that an institution may demonstrate compliance with this requirement by making arrangements that are satisfactory to the Secretary to repay any overawards that resulted from the improper awarding, disbursing, or delivering of Title IV, HEA program funds.

Section 668.8 Eligible Program

English as a Second Language

Comments: Many commenters requested the elimination of the requirement that institutions test students at the conclusion of English-as-a-Second-Language (ESL) programs to substantiate their proficiency in English, and that schools only admit students who "need" such training. Commenters suggested that the Department lacks the authority to require that institutions test program completers in order to evaluate what they have learned or to dictate institutional admissions policies. Furthermore, a number of commenters asserted that they did not believe that the Department had grounds for limiting student aid eligibility for individuals in ESL programs to Federal Pell Grants only, as stipulated in the regulations.

Discussion: Upon further consideration, the Secretary agrees that the assessment of whether an ESL program is providing adequate instruction in English to allow a student to use already existing knowledge, training, or skills should be left to an institution's accrediting agency. Although findings from the Department of Education's Inspector General have revealed more abuses in these programs historically, the Secretary will defer regulating in this area for now to provide the accrediting agencies an opportunity to address this problem. The Secretary notes that an institution is still required to document its determination that ESL instruction is necessary to enable each student enrolled in its ESL program to use already existing knowledge, training, or skills. The Secretary notes that section 401(c)(2) of the HEA limits the eligibility of these ESL programs to the Federal Pell Grant Program. A student may receive other Title IV, HEA program assistance for ESL coursework that is part of a larger eligible program.

Changes: Section 668.8(j)(2) has been removed from the regulations.

Undergraduate Educational Program in Credit Hours

Comments: Five commenters requested that the Secretary put back into the clock-hour/credit-hour conversion regulations the provision that allows the Secretary to determine if a degree is an equivalent degree and therefore exempt from the requirements of the clock-hour/credit-hour conversion formula. Two of the commenters believed that programs offered at institutions accredited by the Association of Advanced Rabbinical and Talmudic Schools, which in some States lead to the First Talmudic degree rather than a baccalaureate degree, is a clear example of an equivalent degree and therefore should be exempted from the clock-hour/credit-hour conversion requirements. Four commenters suggested that the Secretary consider factors such as the length of the program or acceptance as equivalent to the baccalaureate degree for purposes of licensure by a State agency when determining if a degree is in fact an equivalent degree.

Two commenters were concerned about the impact of the clock-hour/credit-hour conversion regulations on hospital-based diploma nursing programs that do not lead to a degree. The commenters believed that it was unfair to reduce Federal financial assistance to students who were enrolled at a hospital-based diploma school of nursing but were taking a substantial number of credits at a local university or community college. The two commenters requested that the Secretary allow programs that offer equivalent credentials to be exempted from the clock-hour/credit-hour conversion requirements.

One commenter requested that the Secretary allow an undergraduate program offered over at least two years to be exempted from the clock-hour/credit-hour conversion regulations if the program was equivalent to an associate degree, as defined under paragraph (b) of this section.

Discussion: The Secretary agrees with those commenters who requested that the Secretary reinsert the provision (previously removed from the clock-hour/credit-hour conversion regulations in the April 29, 1994 final regulations) that an institution offering an undergraduate educational program measured in credit hours and at least two academic years in duration is exempt from applying the formula contained in paragraph (l) to that program if the program provides an equivalent degree as determined by the Secretary, or if each course within the program is fully acceptable for credit toward that institution's equivalent degree. Since publication of the final regulations on April 29, 1994, the Secretary has encountered at least one instance of a degree that the Secretary considers to be an equivalent degree to a baccalaureate degree. Given this additional information, the Secretary believes that it is necessary to reinsert the "equivalent degree as determined by the Secretary" language back into the clock-hour/credit-hour conversion regulations so as not to penalize those institutions that offer the equivalent degree.

With respect to those commenters who were concerned about the impact of the clock-hour/credit-hour conversion regulations on hospital-based diploma schools of nursing and who suggested inserting "equivalent credential" into the regulations to exclude these types of programs, the Secretary believes that the issue has been resolved. Pub. L. 103–382, which was signed by the President on October 20, 1994, amends the HEA to specify that public or private nonprofit hospital-based diploma schools of nursing programs are exempt from the clock-hour/credit-hour conversion regulations as of July 1, 1994. The Secretary has incorporated this statutory exemption into new § 668.9(b) (see discussion in the preamble for § 668.9 under significant changes to the final regulations). Because there is now a statutory exemption for hospital-based diploma schools of nursing, the Secretary sees no reason to provide a broad-based exclusion for non-degree programs and therefore does not believe it to be appropriate to exclude programs that lead to an equivalent credential.

The Secretary disagrees with the commenter who specifically recommended excluding programs that are the "equivalent of an associate degree" as defined under § 668.8(b), from the requirements of the clock-

hour/credit-hour conversion regulations. The Secretary believes that under the definition of the "equivalent of an associate degree," associate degree programs are already exempt from the requirements of the clock-hour/credit-hour conversion regulations, provided that the associate degree program is at least two academic years of study. Furthermore, a two academic year program that is acceptable for full credit towards a bachelor's degree is also exempted from the clock-hour/credit-hour conversion requirements, provided that the bachelor's degree program is offered at the same institution that provides the two academic year program.

Changes: Changes have been made. The Secretary is amending § 668.8(k) (1) and (2) to exempt a program from the clock-hour/credit-hour conversion requirements if the program is an equivalent degree as determined by the Secretary or if each course within the program is fully acceptable for credit toward the institution's equivalent degree.

Comments: One commenter asked if there were any clock-hour/credit-hour conversion requirements for programs offered in number of courses, rather than in credit hours.

Discussion: Institutions that participate in the Title IV, HEA programs must measure their programs in clock hours or in credit hours.

Changes: None.

Subpart B—Standards for Participation in the Title IV, HEA Programs

Section 668.12 Application procedures

Comments: There were a number of comments on this section. Many commenters suggested that the requirement that an entire institution must be recertified if the institution proposes to establish a branch campus or an additional location that will offer 100 percent of an educational program off site be deleted. Institutions expressed their concern that this provision would act as a disincentive for institutions to agree to offer programs at employer sites and would therefore be at odds with the Administration's efforts to increase education and training collaboration between institutions and employers. Some commenters suggested that this provision be revised to exclude programs offered by degree-granting institutions.

Discussion: The Secretary agrees that not all institutions that add an additional location that offers 100 percent of a program need to be required to be recertified. However, the Secretary has determined through experience that the addition of a branch campus or other location that offers a complete educational program can have a major impact on the financial status of the whole institution and the ability of the whole institution to administer the Title IV, HEA programs. For many years, the Secretary has required institutions that seek to add a location at which a complete educational program is offered to undergo a certification review so that the Secretary could ascertain whether the institution has the financial resources and sufficient administrative capability to support another location.

Therefore, the Secretary has removed the requirement that an institution must apply to the Secretary for a certification that the institution continues to meet the standards for participation in the Title IV, HEA programs if the institution adds an additional location that offers 100 percent of a program. However, the Secretary requires the institution to notify the Secretary of the addition of such a location (as institutions that add an additional location that offers at least 50 percent of an educational program are currently required to do) if the institution wishes to have the location included in the institution's participation in a Title IV, HEA program. The Secretary puts institutions on notice that they may be required to file a complete recertification application if the Secretary determines that the addition of the location might impair an institution's administrative capacity or financial strength.

Commenters that discussed employer-sponsored training programs seemed not to understand that if institutions contract with employers to provide training programs at the work-site or some other off-campus location, that the employer is paying for the cost of training, and that no Title IV, HEA program funds are involved, there is no need for the institution to notify the Secretary.

Changes: Section 668.12 has been revised to no longer require an institution to apply to the Secretary for a certification that the institution continues to meet the standards for participation in the Title IV, HEA programs if the institution adds an additional location that offers 100 percent of a program. Section 668.12 has been further revised to require that, if an institution adds an additional location that offers 100 percent of a program, the institution is required to notify the Secretary in accordance with 34 CFR 600.30. The current regulations already provide that the institution may be required to file a complete recertification application if the Secretary deems it necessary.

Section 668.15 Factors of Financial Responsibility

General Standards of Financial Responsibility Cash Reserve

Comments: Many commenters believed that requiring an institution to maintain a cash reserve fund equal to at least 25 percent of the total dollar amount of refunds paid by the institution in the previous fiscal year would not protect students or the Federal government if the institution failed or went bankrupt. The commenters opined that in a bankruptcy proceeding the disposition of any balance in the cash reserve fund would fall under the jurisdiction of a Federal bankruptcy court and therefore would not be available immediately to students or to the government. Furthermore, some commenters indicated that because an institution would have unrestricted access to cash reserve funds the cash assets held in such funds are potentially at risk due to the possibility of preferential transfer or fraudulent conveyance by an owner in advance of a bankruptcy proceeding.

Many other commenters believed that the cash reserve fund requirement was unnecessary in view of all the other requirements that an institution must now satisfy to demonstrate that it is financially responsible. The commenters contended that this requirement would place an "undue burden" on an institution and could prevent the institution from otherwise meeting other financial responsibility standards or even cause the institution to become financially unstable. Moreover, based on the new criteria for calculating a refund under the "fair and equitable" refund provisions, the commenters were concerned that the amount of the cash reserve could grow significantly in a short period of time and would thus place an increasing and on-going financial burden on the institution. Some of these commenters, and other commenters, urged the Secretary to reduce the amount of the required reserve from 25 percent to either 10 percent or an amount that would be necessary for the institution to be able to make refunds for a 30-day period. Another commenter suggested that the Secretary impose the cash reserve requirement only on an institution that does not satisfy all other financial responsibility standards; or, require that the institution maintain, temporarily, a cash reserve fund until the institution is able to provide, to the Secretary, an irrevocable letter of credit.

Other commenters believed that the cash reserve requirement would adversely affect an institution's ability to maintain its educational standards because capital that would traditionally be available to the institution for reinvestment in the institution or otherwise used to support the institution's educational services and facilities would now have to be wastefully set aside in a reserve fund. The commenters suggested that the Secretary restructure the requirement to allow an institution to mitigate or eliminate its cash reserve if the institution could demonstrate set levels of reinvestment in its business through capital acquisition. At a minimum, the commenters urged the Secretary to allow an institution to provide a bond or letter of credit in lieu of the cash reserve fund requirement.

One commenter believed that the separate fund provision of this requirement would be particularly troublesome because it would impose accounting, reporting, and management burdens that would not be warranted for all institutions. The commenter recommended that the Secretary provide an alternative method under which an institution could prove that it met all the requirements of this section. Specifically, the commenter suggested that the Secretary allow an institution that issues debt in the public debt markets and achieves an "investment grade" credit rating on that debt issue with a nationally recognized debt rating service to establish that it is financially responsible in this manner.

Still other commenters believed that the Secretary was imposing an unreasonable financial burden on an institution that participates in a State tuition recovery program. The commenters noted that since the Secretary has not approved any State tuition recovery funds, an institution that would otherwise be exempt from the cash reserve requirement would have to continue to contribute to the State's fund and would, for identical reasons, be required to maintain for Federal purposes a cash reserve fund. These commenters urged the Secretary to grant relief to institutions by acting expeditiously to approve State tuition recovery programs.

One commenter noted that the term "refunds", as used in this section, could mean tuition refunds, institutional refunds, or any disbursements made to students. The commenter suggested that the Secretary clarify the meaning of the term so that an institution may calculate correctly the amount of its required cash reserve.

A number of commenters contended that the requirement to maintain the cash reserve fund in a bank account or in the form of short-term securities was unnecessary and restrictive. One of these commenters believed that the Secretary should exempt from the separate cash-reserve fund requirement an institution that had sufficient unrestricted funds to pay required refunds. Other commenters urged the Secretary to allow an institution to maintain its cash reserve in a money market fund or in other Federal government securities with maturities of one year or less.

A few commenters believed that the establishment of a cash reserve fund could be a problem for public institutions located in a State that controls directly the receipt and disbursement of funds. The commenters noted that those institutions may not have the authority under State law to establish a cash reserve fund. Another commenter noted that many public university systems operate under a pooled treasury concept. Under that scheme, the three-month U.S. Treasury notes that could be used to satisfy the cash reserve fund requirement would not be earmarked to one campus. Consequently, the commenter recommended that instead of requiring each campus to calculate the amount of a reserve fund and maintain that fund, the Secretary should revise the regulations to allow a public university system to (1) calculate the amount of the reserve fund based on the total refunds of all system campuses and, (2) maintain one consolidated reserve fund for all the system's campuses.

Discussion: Under section 498(c)(6) of the HEA, the Secretary is charged with establishing requirements to ensure that an institution maintains sufficient cash reserves to pay required refunds. The Secretary believes that an institution's ability to make required refunds is enhanced by requiring the institution to reserve a portion of the cash it receives from students in advance of providing educational services. In this regard, the Secretary established the cash-reserve-fund requirement on the premise that if an institution, at the beginning of its fiscal year, reserved a reasonable amount of cash of an amount based on a percentage of the institution's historical refund experience, the institution would have sufficient cash reserves to make refunds to students. However, the Secretary is convinced that many points made by the commenters are valid, and that a performance-based approach will better accomplish the statutory requirements and the Secretary's objectives.

Under this performance-based approach, the Secretary would consider an institution to have satisfied the statutory requirement, that the institution maintained sufficient cash reserves to make required refunds, if for two consecutive years (1) the institution demonstrates, to the satisfaction of the Secretary, that it has made all required refunds to students in a timely manner, and (2) that it has met or exceeded all of the financial responsibility standards in § 668.15(b) in both of its last two consecutive fiscal years. An institution that demonstrates that it satisfies these criteria provides reasonable assurance to the Secretary that the institution will continue to make required refunds in a timely manner. Moreover, the Secretary believes that such an institution is not likely to close precipitously because the institution will have demonstrated over a period of time that it is financially responsible. Along the same lines, the Secretary acknowledges that there is little, if any, risk associated with an institution that has its liabilities backed by the full faith and credit of a State, or by an equivalent governmental entity, and therefore considers such an institution to have sufficient cash reserves to make required refunds.

Conversely, the Secretary believes that the risk of precipitous closure increases significantly for an institution that is unable, or unwilling, to make required refunds in a timely manner, or that fails to meet the financial responsibility standards. Therefore, upon a finding by the Secretary, or an independent auditor engaged in the performance of a financial or compliance audit, or a SPRE, or a State licensing authority, that the institution failed to make required refunds in a timely manner, or failed to satisfy the standards of financial responsibility under § 668.15(b) in either of the institution's last two complete fiscal years, the Secretary shall require the institution to submit to the Secretary an irrevocable letter of credit equal to at least 25 percent of the total amount of refunds the institution made, or should have made, during the institution's last complete fiscal year. This irrevocable letter of credit requirement may be satisfied in conjunction with any letter of credit that may be required under § 668.13(d)(1) or § 668.15(d)(2). The Secretary may, in his sole discretion, require that two or more letters of credit be established separately with common expiration dates or combined into a single letter of credit.

In establishing this performance-based requirement, the Secretary considered carefully the points made by the commenters who noted that the

reserve-fund requirement would provide little, if any, protection to students in the event that an institution went bankrupt, and the commenters who argued that it was unnecessary or counter-productive to require an institution that otherwise satisfies its financial and fiduciary responsibilities to maintain a reserve fund. The Secretary believes that by applying the letter of credit provision only to non-performing institutions, this requirement provides the necessary incentive for institutions to make, and to continue to make, refunds in a timely manner, provides reasonable assurance that the Secretary will be able to make refunds to students in the event that an institution closes precipitously, and at the same time relieves the burden on performing institutions.

The Secretary notes that since this requirement will not take effect until July 1, 1995, an institution must continue to comply with the current 25 percent cash-reserve requirement until that date. Therefore, in response to public comment and further review, the Secretary wishes to clarify the following issues. First, with respect to calculating the amount of the cash reserve, the term "refunds" includes only refunds of title IV, HEA program funds. Second, an institution may borrow cash from its reserve fund but only when this is necessary for the institution to comply with the requirement that it make timely refunds. If an institution uses the reserve fund for this reason, the Secretary will consider the institution to be in compliance with the requirement in § 668.15(b)(5)(i) if the institution demonstrates that it maintained an average monthly fund balance in its cash reserve fund that was at least equal to the amount of the required cash reserve. Lastly, because an institution must demonstrate its compliance with the reserve-fund requirement by providing the required information in a note to its audited financial statement, the institution may, in lieu of establishing a separate cash-reserve fund for each of its locations, establish a single cash-reserve fund that represents the institution's combined refund exposure for all locations. To enable the Secretary to make a determination regarding an institution's compliance with this provision, the refund experience and cash reserve requirement for each eligible and participating institution shall be disclosed separately in the required footnote.

Changes: Section 668.15(b)(5) is amended to require that, institutions not coming within the performance-based exception set out in § 668.15(d)(1), must submit to the Secretary an irrevocable letter of credit, that is acceptable and payable to the Secretary, for an amount equal to at least 25 percent of the total amount of title IV, HEA program refunds the institution made, or should have made, during the institution's last complete fiscal year.

In addition, the Secretary makes the following conforming changes to § 668.15(d), *Exceptions to the general standards of financial responsibility.* First, the Secretary amends § 668.15(d)(1) to exempt from the requirement to submit an irrevocable letter of credit, an institution that (1) has its liabilities backed by the full faith and credit of a State, or equivalent governmental entity, or (2) any institution that has, for both of its two latest consecutive fiscal years demonstrated, to the satisfaction of the Secretary, with the support of an audited financial statement submitted in accordance with § 668.15(e) and § 668.23(c), that it has made all of its required title IV, HEA program refunds in accordance with the "timely payment" provisions in § 668.22(j)(4), and has for both of those years met or exceeded the standards of financial responsibility under § 668.15(b). Second, in § 668.15(d) the Secretary determines an institution's compliance with the two-consecutive-year performance requirement by evaluating (1) the institution's compliance audit reports and audited financial statements covering that 2-year period, and (2) any untimely refund findings during that two-year period from a program review, a SPRE, other State agency or an independent auditor. This section also requires the institution to have met the standards of financial responsibility under § 668.15(b) for the 2-year period. If an institution is cited by an auditor for a condition that would no longer permit it to use the exemption in 668.15(d)(1), the institution must notify the Secretary of that fact within 30 days of receiving such notice from its auditor, and must take immediate steps to secure the required letter of credit.

The Secretary has made a conforming change to §§ 668.15(b) (7)(i)(A) and (8)(i)(B) by removing the reference to the cash reserve fund in the delineation of items that would be included in the list of institutional assets for the acid test analysis.

Acid Test Ratio

Comments: A number of commenters agreed with the Secretary's decision to exclude from the calculation of the acid test ratio uncollateralized receivables from owners and related parties.

Several commenters argued that the use of an acid test ratio, as more of a test of liquidity than of assets, was contrary to Congressional intent.

Other commenters believed that the acid test ratio was defined too narrowly in the regulations to include as current assets only cash, cash equivalents, and current accounts receivables. The commenters noted that generally the acid test ratio is defined as current assets less inventory divided by current liabilities. Such a definition would allow other current assets not included in the regulatory definition to be used in calculating the acid test ratio. However, the commenters opined that an acid test ratio, regardless of how it is calculated, is inappropriate and therefore not applicable to the education training industry. The commenters argued that the short-term liquidity requirements imposed by the acid test ratio would force an institution to delay making capital investments to the detriment of its students. To make a better assessment of the financial performance and stability of an institution, some of the commenters suggested that the Secretary should evaluate the significance of the ratio in view of other financial indicators such as operating losses, negative equity, or commercial loan defaults. Other commenters suggested that in view of the new institutional oversight provisions under Part H of the HEA the Secretary should adopt for these regulations the previous 1:1 current ratio requirement. A few other commenters urged the Secretary to remove the acid test ratio requirement because they believed that the new audit requirements would provide safeguards sufficient to ensure that an institution could meet its liabilities and remain operational. Still other commenters suggested that if an institution failed to meet the acid test ratio requirement, the Secretary should merely refer the institution to the State for review under the provisions of the State Postsecondary Review Program. Yet another commenter urged the Secretary to adopt as a satisfactory measure of liquidity the acid test ratio of between 0.5 to 0.75:1 suggested by the American Institute of Certified Public Accountants (AICPA).

One commenter believed strongly that the Secretary should not allow an institution to include accounts receivable on the asset side of the acid test ratio because the receivables could not be readily liquidated.

A few commenters believed that for purposes of calculating the acid test ratio an institution should not be able to consider as a cash equivalent the cash

reserve under § 668.15(b)(5). The commenters noted that the cash reserve would be a restricted fund (i.e., used only for the payment of refunds) and therefore would not be available to pay the general debts of the institution. Thus, the commenters contended that if the Secretary allowed institutions to include the cash reserve as a current asset an otherwise insolvent institution might be able to satisfy the acid test requirement. Another commenter agreed with the provision that cash reserves should be included in the acid test ratio but believed that the provision should be expanded to read as follows: "Reserve funds created in accordance with § 668.15(b)(5) may be included as cash equivalents in calculating the institution's acid test ratio." Still other commenters suggested that fixed assets, prepaid expenses, and inventory be included in calculating the ratio.

One commenter noted that an institution could be financially stable despite its failure to meet the 1:1 acid test ratio requirement. The commenter opined that an auditor would be in the best position to determine whether an institution was financially stable and suggested that the Secretary require the auditor to make that determination based on guidance issued by the AICPA regarding an auditor's responsibility for determining an institution's ability to continue as a going concern. The commenter suggested that in lieu of the acid test ratio the Secretary should require an auditor to make a "going concern" determination and hold the auditor responsible for applying the AICPA guidelines in making that determination.

Discussion: Section 498(c)(2) of the HEA directs the Secretary to prescribe criteria with respect to operating losses, net worth and assets-to-liabilities ratios to determine that an institution is financially responsible. The Secretary maintains that the acid test ratio is an appropriate measure of financial responsibility for an educational institution because it provides a reliable measure of an institution's ability to meet current obligations as they come due. Because, in general, financial obligations must be satisfied in cash, the Secretary has chosen an acid test ratio, because it relies only on those assets that have the highest probability of conversion into cash. The Secretary has chosen to exclude less liquid items such as inventory, related party receivables, and prepaid or deferred items for the following reasons: (1) As a provider of services, an educational institution does not, in general, acquire and maintain significant inventories of saleable products. Accordingly, for most educational institutions, the exclusion of inventory from any calculation yields a value that is not significantly different from one that would be obtained if such inventories were included. Furthermore, because of difficulties associated with the valuation of inventories, and the existence of differing methodologies of accounting for inventories and, because a distressed liquidation of inventory items by an institution in financial difficulty may result in the realization of only a portion of their actual value, comparability of inventory values among institutions is extremely difficult. The Secretary, in seeking a fair basis of comparison that is applicable to all institutions, chose to exclude inventories from any calculation of liquidity;

(2) Related party receivables that are uncollateralized represent unsecured claims on the assets of other businesses or individuals the repayment of which is substantially at the discretion of the controlling individual or business entity. While in many cases these assets are accounted for as demand notes and hence they are appropriately classified as current, they are in fact repayable at the discretion of the controlling individual, and the Secretary has seen institutions close for financial reasons without having demanded such repayments from related parties. Because the Secretary cannot reasonably determine the probability that such claims will be paid, the Secretary believes that he is justified in excluding these items from any calculation of liquidity; and

(3) In general, prepaid items and deferrals represent past outflows of cash that may provide future economic benefits to an institution. Because the realization of these assets depends in large part on the continued existence of the educational institution, the Secretary believes it is appropriate to exclude these items when evaluating an institution at a fixed point in time.

The Secretary believes that a minimum ratio of at least cash and current accounts receivable to all current liabilities is an appropriate measure of an institution's ability to meet all of its financial obligations. While many have argued that unearned tuition liabilities do not represent financial claims on the assets of an institution, and therefore should be excluded, the Secretary would argue that unearned tuition liabilities are more accurately characterized as cash collected from students in advance of providing educational services. As these funds are not yet earned by the institution, the Secretary believes that it is appropriate to require that an institution have adequate liquid resources on hand to provide refunds to students that withdraw or to fund a teachout should the institution close at other than the end of an academic period. Furthermore, while the Secretary concedes that such claims are not direct financial claims comparable to a fixed debt they represent obligations to perform a service. The performance of that service will incur liabilities or the liquidation of assets over the next operating period. Since a substantial portion of the unearned tuition income that flows into an institution's revenue accounts is immediately expended to provide for such things as instructor's salaries, rent, utilities and other operational expenses, only a portion of unearned tuition liabilities are ultimately realized as profit by the institution. It is the Secretary's belief that a financially responsible institution should be able to finance continuing operations out of earnings retained as a result of past profits and not from the cash prepayments of students who have yet to receive any educational benefit.

The Secretary believes that, for the most part, institutions that make significant capital expenditures that are expected to benefit the institution in future periods will finance those expenditures with long-term financing arrangements. Accordingly, the Secretary believes that capital acquisitions to the extent that they are externally financed or funded from long-term sources of funds would not significantly impact the acid test ratio. The Secretary recognizes that a number of institutions incur significant expenses associated with marketing and advertising and that many institutions refer to these operating expenses as capitalized costs, often including these past expenses as a current asset on the institution's balance sheet. The Secretary believes that these costs are more appropriately characterized as operating expenses and does not recognize such capitalized assets in the acid test calculation.

Contrary to the opinion expressed in the comment, the AICPA does not establish standards with respect to performance indicators such as the acid test ratio.

While the Secretary does not agree that fixed assets should be included in the calculation of the acid test ratio because such assets are considerably less liquid than those that are included in the ratio calculation, the Secretary does consider the institution's total financial circumstances in determining an institution's compliance with Federal financial responsibility standards. The

Secretary includes in his calculation of tangible net worth all the assets of an institution to the extent that the value of these assets exceeds the institution's liabilities after adjusting for intangible assets.

Changes: See conforming changes made as a result of comments on the cash reserve requirement.

Exceptions to the General Standards of Financial Responsibility

Comments: One commenter was concerned that an institution that participated in an inadequate State tuition recovery fund would be able to avoid the more rigorous requirement in § 668.15(b) under which the institution would need to maintain in a separate fund a cash reserve equal to at least 25% of the total dollar amount of refunds paid by the institution in the previous fiscal year. The commenter suggested specific criteria that the Secretary should consider in determining the adequacy of a State's tuition recovery fund. Specifically, the commenter suggested that in assessing a State's fund the Secretary should consider (1) the maximum fund level, (2) the current fund balance, (3) the amount of annual assessments collected by the fund, (4) the amount of claims paid out by the fund, (5) the authority of the fund administrator to levy against institutions participating in the fund additional assessments and the administrator's history of levying and collecting additional assessments, (6) the fund's history of paying claims, including the percentage of claims paid, (7) the compliance by an institution (or institutions) with the fund's assessment and payment requirements and, (8) whether students at an institution have received their refund payments from the fund instead of from the institution. Furthermore, the commenter urged the Secretary to exempt an institution from the 25% cash reserve requirement only if the Secretary concluded from the criteria identified above that a State would be able to pay all claims made against the fund.

A few commenters questioned the authority of the Secretary to determine the acceptability of a State's tuition recovery fund. These commenters argued that since the statute mandated the use of State tuition recovery funds the Secretary should merely require a State to certify that its fund would be able to pay required refunds to students for institutions that closed precipitously. In addition, regardless of the Secretary's authority in this matter, the commenters believed strongly that if the Secretary approves State tuition recovery funds on a State-by-State basis, in determining whether to approve a State's fund the Secretary should consider the State's entire plan for dealing with closed institutions, including provisions for teach-outs.

Many other commenters urged the Secretary to approve existing State tuition recovery funds, or give presumptive approval to those funds, because of the reasons identified in the discussion regarding the 25% cash reserve requirement.

Discussion: Section 498(c)(6) of the HEA provides that an institution may be granted an exemption from the cash reserve requirement if it participates in a state tuition recovery fund that is acceptable to the Secretary. At this time the Secretary is evaluating possible standards that can be used for determining the acceptability of a State's tuition recovery fund. While no definitive criteria have yet been established, the Secretary has determined that three specific criteria will be examined in the design and operation of a State's tuition recovery to determine whether it is acceptable in lieu of the other cash reserve requirements.

The Secretary does not intend to grant presumptive approval to any state tuition recovery fund, but instead will examine applications from states on a case-by-case basis. In evaluating an application from a State for a blanket approval of its tuition recovery fund to exempt its participating schools from the federal cash reserve requirements, the Secretary will consider the extent to which the state tuition recovery fund: 1) provides refunds to both in-state and out of state students, 2) makes all refunds in accordance with the refund payment procedures in § 668.22(h), 3) provides a reliable mechanism for the State to replenish a fund should any claims arise that deplete the funds assets.

Changes: Section 668.15(d)(1)(ii) has been amended to delineate the items that the Secretary will consider in determining whether a State tuition recovery fund is an acceptable substitute for the federal cash reserve requirement. The Secretary may also consider other factors presented in an individual state application on a case by case basis. See also conforming changes made as a result of comments on the cash reserve requirement.

Section 668.16 Standards of Administrative Capability

Comments: One commenter suggested that as a factor in the determination of a designated individual's ability to administer the Title IV, HEA programs at an institution, the Department should mandate that a capable individual must not have defaulted on a Federal or State loan.

Discussion: The Secretary has no evidence that any notable percentage of these individuals has defaulted on a Federal or State loan. Furthermore, the Secretary believes that it would be extremely burdensome for an institution to adequately screen applicable employees to ensure that none of them had defaulted on a Federal or State loan or grant.

Changes: None.

Comments: Six commenters supported the Secretary's use of third-party servicers in determining whether or not an institution has an adequate number of qualified personnel on hand in determining whether or not an institution is administratively capable.

Discussion: The Secretary is pleased to have been able to make this change in the final regulation as a result of public comment on the February 28, 1994 NPRM.

Changes: None.

Comments: Several commenters suggested that the prohibition on having different family members perform the two functions of authorizing payments and disbursing or delivering funds is onerous, particularly in a small, family-run institution. These commenters requested that smaller institutions be exempted from this provision.

Discussion: This standard was strengthened to provide additional deterrence to collusion, which is a major problem at institutions that engage in fraud and at many institutions that fail to make refunds. The strengthened language also gives the Secretary added, needed authority to terminate institutions that engage in collusion.

The Secretary understands the concern of small family-run institutions that arranging for someone outside the family to perform one of these tasks may be burdensome. However, at very small institutions not meeting this standard, the compliance audit would probably report that there are insufficient internal controls unless the procedures to use additional staff were followed.

Changes: None.

Comments: A number of commenters suggested that the requirement that an institution does not meet the administrative capability standards if it does not have satisfactory academic progress standards of 150 percent of the time it takes to complete a program bears no logical relationship to the standards of administrative capability and therefore, should be deleted.

Discussion: Because students are required by Title IV of the HEA to

maintain satisfactory progress to receive Title IV, HEA program assistance, it is logical that an institution's ability to administer Title IV, HEA programs must be judged, in part, on the existence and implementation of an adequate satisfactory progress policy. Furthermore, the general requirements that a school have a satisfactory academic progress policy have been a part of the administrative capability standards in the general provisions regulations for many years.

In order to maintain the integrity of the Title IV, HEA programs, the Secretary does not believe that Title IV, HEA program assistance should be provided beyond the point at which a student can reasonably be expected to complete his or her education. The Secretary believes that this regulation achieves this objective.

Change: None.

Comments: A number of commenters felt that the Department is wrong in justifying this policy of satisfactory academic progress on the grounds that a similar period will be used to calculate completion rates under the Student-Right-to-Know Act, since the latter is a consumer information statute that does not address student aid eligibility. Furthermore, the Student-Right-to-Know Act applies only to first-time, full-time degree seeking students while the satisfactory academic progress standards would apply to all Title IV students.

Discussion: The Secretary was not trying to justify the satisfactory academic progress policy based on the Student-Right-to-Know Act. The Secretary was merely pointing out that the Student-Right-to-Know Act also uses the concept of a full-time undergraduate student completing a program in no more than 150 percent of the published length of the educational program.

Changes: None.

Comments: A number of commenters opposed the minimal satisfactory academic progress standards set by the Department on the basis that they would discriminate against minority and disabled students. Many commenters suggested that the imposition of the 150 percent timeframe does not provide traditional students between the ages of 18 and 24 much leeway to change programmatic decisions. Furthermore, several commenters suggested that the regulation should provide for a phase-in of the standard, because if it is not phased-in over time, many students will have entered postsecondary education under one assumption about timeframes for completion only to have these assumptions changed sometime during their educational career. The commenters felt that for many students, it will not be possible or practical to change these timeframes and it would be unfair to hold them to any new standard.

A few commenters believed that the satisfactory academic progress provisions were confusing and overly burdensome.

Discussion: Section 668.16(e)(3) modifies earlier regulations which provided that an institution must establish a maximum timeframe in which the student must complete his or her educational objective, by providing that the maximum timeframe can be no longer than 150 percent of the published length of the educational program. The 150 percent can be calculated using credit hours, clock hours, terms, academic years, or any other reasonable measure. For example, a school with an undergraduate program consisting of 120 credit hours may have a policy that includes a provision requiring a student to complete the program within 180 credit hours. Such a policy would not only provide a traditional student attending full-time 6 years to complete a 4-year program, but also easily accommodate most non-traditional students because the use of credit hours as the measure allows for less than full-time attendance as well as non-consecutive enrollments.

The Secretary recognizes that these requirements may create a hardship for some students who were maintaining progress under the institution's old policy but do not meet the requirements of the new policy. However, § 668.16(e)(3)(vii) requires each institution to have procedures for students to appeal determinations that they are not making satisfactory progress, and an institution may consider as part of a student's appeal whether mitigating circumstances are present that would justify payment to an otherwise-ineligible student. With such a determination that mitigating circumstances are present, a student who otherwise would fail one or more tests of the institution's satisfactory progress standards could still be eligible for payment for the increment of education used to measure satisfactory academic progress under § 668.16(e)(3)(ii).

For student appeals under the institution's satisfactory academic progress standards for aid disbursed during the 1994–95 award year, a student who met the institution's standards prior to July 1, 1994, but does not meet the new satisfactory progress standards might be awarded an additional disbursement for the increment of education used to measure satisfactory academic progress under § 668.16(e)(3)(ii) if such a disbursement would permit the student to complete the program during that period.

An institution must determine and document each student's eligibility for an extension of eligibility due to a mitigating circumstance on an individual basis. An institution cannot routinely grant every applicable student an extension of eligibility as a means to circumvent the 150 percent provision.

The Secretary has recognized the need to clarify and simplify the provisions related to satisfactory academic progress. While this section has been rewritten in an effort to meet these goals, the underlying policies as provided for in the April 29, 1994 final regulations have not been altered.

Changes: Section 668.16(e) has been amended to clarify that the satisfactory academic progress standards of this section are for purposes of determining student eligibility for Title IV, HEA program assistance and does not apply to non-Title IV students. The Secretary has removed the requirement that an institution's standards are considered to be reasonable if the standards conform with the standards of satisfactory progress of the institution's nationally recognized accrediting agency if the agency has those standards. Section 668.16(e)(2) has been amended to clarify which required elements of an institution's standards are qualitative and which are quantitative. Section 668.16(e)(2)(ii)(A) has been amended to clarify that the maximum timeframe in which a student must complete his or her educational program must be, for an undergraduate program, no longer than 150 percent of the published length of the educational program *measured in academic years, terms, credit hours, or clock hours.* Section 668.16(e)(4) has been amended to clarify that the Secretary considers an institution's satisfactory academic progress standards to be reasonable if the standards provide for a determination at the end of each increment by the institution as to whether the student has met the qualitative and quantitative components of the standards instead of a determination that the student has successfully completed the appropriate percentage or amount of work according to the established schedule. Section 668.16(e)(6) has been amended to clarify that the Secretary considers an institution's satisfactory academic progress standards to be reasonable if the standards provide specific procedures for a student to re-establish that he or she is maintaining satisfactory progress rather than for a reinstatement of a student's aid.

Comments: A large number of commenters stated that an institution's default rates are not indicative of an institution's administrative capability. Many commenters argued that the proposal to use Federal Stafford Loan and Federal SLS program default rates as a criterion of administrative capability went beyond the statute and Congressional intent.

Other commenters asserted that the use of default rates is unfair to institutions with small numbers of students. These commenters suggested that institutions with small number of students either be exempt from using default rates as an indicator of administrative capability or that these institutions be given the opportunity of withdrawing from certain programs rather than being penalized for participation in high-risk programs.

Discussion: The Secretary points out that the use of default rates as a determining factor in the evaluation of an institution's administrative capability is not new. The Secretary does not agree with those commenters who assert that default rates are not indicative of administrative capability.

Changes: None.

Comments: Many commenters suggested that the requirement that an institution with an annual withdrawal rate of more than 33 percent does not demonstrate administrative capability be eliminated. Some of these commenters asserted that use of a 33 percent withdrawal rate as an absolute standard would result in discrimination against high-risk minority students, reducing opportunities available to them. Commenters also asserted that this standard would adversely affect community colleges that enroll a significantly large number of adult, nontraditional students, many of whom exit and return to the institution several times during their academic careers, or transfer to other institutions. Another commenter noted that institutions located near military bases, where transfers of personnel are routine, could experience high withdrawals of students. Most of these commenters recommended that this provision be eliminated.

Several commenters suggested that this provision duplicates efforts by the SPREs and should, therefore, be eliminated.

Discussion: Because SPREs must establish withdrawal rates that are applicable to institutions that are referred to the SPRE, the Secretary agrees with the commenters that this provision duplicates efforts by the SPREs. However, the Secretary believes that the use of a withdrawal rate standard to evaluate whether an institution should be permitted to begin participation in a Title IV, HEA program is essential to effective gatekeeping for the Title IV, HEA programs. Therefore, the Secretary has revised the withdrawal rate requirement to make it applicable only to institutions that seek initial participation in a Title IV, HEA program.

The Secretary does not accept the argument of some commenters that withdrawal rates are not an appropriate measure of administrative capability. On the contrary, the Secretary finds that withdrawal rates are a clear measure of administrative capability as they are a function of overall institutional performance and the information and support services that an institution provides to its students and prospective students.

The Secretary expects that an institution that has good admissions procedures and administers the ability-to-benefit provisions properly will have a lower withdrawal rate than one which admits students who cannot benefit from the program either because they lack the academic ability or because they do not receive adequate support services. An institution that provides proper disclosures, such as the institutional and financial assistance information required to be provided to students and prospective students under subpart D of these regulations, and in the case of an institution that advertises job placement rates as a means of attracting students, data concerning graduation and employment, and applicable State licensing requirements, as required in the program participation agreement in § 668.14(b)(10), will be providing information necessary for prospective students to make informed decisions. The Secretary believes that if prospective students receive adequate and accurate information, they will drop out of an institution in lesser numbers. Further, if an institution provides the financial aid counseling required in § 668.16(h), the Secretary expects that students are not likely to withdraw because of a lack of understanding about the financial resources available to them.

The Secretary notes further that students who withdraw may be eligible for a refund, especially now that more stringent refund policies have been set forth in these regulations at § 668.22. Were an institution to have a high withdrawal rate, it follows that an institution might experience difficulty complying with the refund requirement. The Secretary also believes withdrawal rates are related to default rates in the FFEL and Federal Perkins Loan programs in that students who withdraw are more likely to default.

The Secretary also believes it is more appropriate to measure an institution's withdrawal rate on an award year time period, rather than an academic year time period. The Secretary notes that other enrollment information that an institution is required to report to the Department, such as the number of correspondence students, incarcerated students, and ability-to-benefit students, is all reported for an award year. This change will allow an institution that seeks initial participation in a Title IV, HEA program to report withdrawal rate information in a manner consistent with this other enrollment information.

The regulations currently provide that an institution does not count as a withdrawal any student who was entitled to and received in a timely manner in accordance with § 668.22, a refund of 100 percent of tuition and fees under the institution's refund policy. Because the withdrawal rate provision will now only apply to institutions that seek initial participation in a Title IV, HEA program and, therefore, have not been required to make refunds in accordance with § 668.22, the Secretary has removed the requirement that the refund must be made in a timely manner in accordance with § 668.22

Changes: Section 668.16(l) has been revised to require that an institution that seeks initial participation in a Title IV, HEA program must have a withdrawal rate less than or equal to 33 percent in order to be administratively capable. Section 668.16(l) has been further revised to require that an institution calculate its withdrawal rate for an award year. Section 668.16(l) has been further revised to remove the requirement that a refund must be made in a timely manner in accordance with § 668.22.

Comments: One commenter objected to the elimination of § 668.16(l) as proposed in the February 28, 1994 NPRM in which the Department proposed to require that institutions provide certain types of information to students.

Discussion: The Secretary continues to believe that providing adequate and accurate information to students and prospective students, so they can make informed decisions, is a function of proper administration of the Title IV, HEA programs. However, this requirement is covered in the section on the Program Participation Agreement, § 668.14, and therefore is being removed from the administrative capability standards section.

Changes: None.

Comments: One commenter objected to the elimination of § 668.16(m) as proposed in the February 28, 1994 NPRM in which the Department would have required that institutions have advertising, promotion, and recruitment practices that reflected the content and objectives of the programs offered by the institution.

Discussion: While the Secretary continues to believe that advertising, promotion and recruitment practices that reflect the content and objectives of educational programs accurately is a critical aspect of the proper administration of the Title IV, HEA programs, the Secretary also recognizes that accrediting agencies and SPREs will address these practices and agrees with those commenters who recommended that these proposed requirements not be included in the final regulations.

Changes: None.

Section 668.22 Institutional Refunds and Repayments

General

Comments: Close to 200 commenters requested that the Secretary simplify the refund requirements of this section. Many of the commenters suggested that the Secretary merely repeat the language of the statute. These commenters believed that using only the language of the statute will provide institutions with the necessary flexibility to administer the statute in the most reasonable and efficient manner. Fifty-nine commenters pointed out that the area of refunds has traditionally been left to institutions for self-regulation and it should remain that way. One hundred commenters felt that the complexity of the refund provisions will promote noncompliance. Five commenters contended that these refund requirements will cause institutions to lose income. The commenters felt that, as a result, an institution will be forced to reduce operating expenses by reducing employees, supplies, equipment, training, etc., and/or significantly increase tuition. Five commenters noted that this provision does not take into account that contracts with instructors based on full-class attendance have already been made. Sixteen commenters felt that the provisions of this section will place too great a financial and administrative burden on institutions. Six commenters felt that as a result of the financial burden, institutions will not be able to meet the standards set out in § 668.15, *Factors of financial responsibility.* Eight commenters felt that the effective date of these provisions should be delayed because of the complexity and severe impact of these provisions.

Discussion: The Secretary understands the commenters' frustrations with the intricacies of the refund provisions of this section. The Secretary has sought to simplify the refund procedures to reduce administrative burdens and make changes that will reduce financial burdens on institutions. However, the Secretary notes that the Department is committed to reducing the widespread fraud and abuse associated with the making of refunds. Any suggested changes that would reduce administrative and financial burdens on institutions while continuing to provide the level of protection to which the Department is committed, were given serious consideration. The Secretary continues to welcome suggested amendments to these regulations that will achieve these goals. To this end, the Secretary does not believe that merely repeating the language of section 484B of the HEA in regulations would provide sufficient safeguards to Title IV, HEA program funds.

Further, because of this commitment to the reduction of fraud and abuse, the Secretary does not believe it is in the best interest of the student or the Title IV, HEA programs to delay implementation of the refund provisions of the April 29, 1994 final regulations. The Secretary understands that institutions may inadvertently make mistakes in their implementation of the provisions of this section and whenever possible the Secretary will take into consideration whether an institution that has calculated refunds improperly has, nonetheless, made a good faith effort to comply. In determining whether administrative sanctions will be pursued against an institution that has failed to pay refunds in accordance with the regulations, the Secretary will examine whether such an institution can demonstrate a good faith effort to comply with the provisions of this section, or whether the institution sought to avoid its responsibilities for properly making refunds by ignoring the calculations required by regulation. An institution must demonstrate that it has made a reasonable attempt to implement the refund provisions based on all information available at the time.

Changes: See changes to specific refund sections below.

Comments: Four commenters stated that it is sufficient that the SPREs are charged with setting standards for student refunds that are in compliance with the HEA. Four commenters contended that the provisions of this section are often in conflict with established State policies which have been based on a thorough and realistic analysis of the needs and interests of the State. One commenter felt that the regulation of refunds should not be used to curb abuse at institutions. The commenter felt that other gatekeeping functions will address fraud and abuse.

Discussion: The HEA has specifically charged the Secretary with oversight in the area of refunds, and the Secretary therefore has the primary responsibility for determining whether refunds are paid timely and in accordance with Federal requirements. Although an institution's SPRE or other State agency may have certain concerns about an institution's refund practices, the Secretary has the primary responsibility for establishing refund requirements that will ensure the protection of the Title IV, HEA programs.

Changes: None.

Comments: Three commenters noted problems with the law on refunds and urged the Secretary to support changes to the law that will lead to a coherent and consistent Federal policy on refunds. Two commenters suggested that all institutions be required to use one refund policy. Two commenters suggested the use of the pro rata refund policy for all Title IV, HEA program assistance recipients. One commenter suggested that an institution should owe a 100 percent refund to a student who withdraws within the first two weeks, with the percentage of the refund decreasing by 10 percent each week thereafter until the sixth week. No refund would be due after this time. The commenter felt that this would give a student a sufficient amount of time to assess the institution without penalizing the institution. One commenter recommended that all institutions use terms to award aid. An institution would retain zero percent of institutional charges for a student who withdraws in the first week of the program. The amount the institution could retain would then increase by 10 percent increments each week for the next seven weeks. No refund would be required after that point. The commenter suggested that a student who attends at least one day in a seven-day period would be counted as having attended a full week. The institution would determine the percentage contribution of all sources of funds to institutional charges at the time the student is awarded aid. The commenter suggested that the institution use these percentages to determine the amount that the institution will retain from each source of funds. One commenter suggested that only institutions with high withdrawal rates or with

excessively high tuition be required to calculate refunds under the pro rata refund provisions.

Discussion: The Secretary notes that the specific changes suggested by these commenters would require changes in the law. The Secretary agrees that certain changes in the law on refunds may be desirable and is willing to work with members of the community to achieve legislation that is coherent, consistent, and effective.

Changes: None.

Comments: One commenter suggested that the Secretary not require institutions to pay refunds to students who withdraw for reasons outside of the control of the institution, for example, those who withdraw for purely personal reasons. Likewise, one commenter felt that the pro rata refund provisions should be limited only to those students who officially notify the institution of their withdrawal, since most students are old enough to be held legally accountable for the contractual agreements made during admission to the institution. One commenter recommended that the term "drops out" be replaced with the term "officially withdraws" since it is unduly burdensome to require an institution to determine the date on which a student has unofficially dropped out.

Discussion: The Secretary believes that the HEA makes clear that students who withdraw from an institution for whatever reason are entitled to any refund owed in accordance with the law and applicable regulations.

Changes: None.

Comments: Nine commenters felt that it would be impossible to explain these refund policies to students. One commenter supported the requirement that an institution provide a clear and conspicuous written statement of its refund policy to students and prospective students.

Discussion: The Secretary believes that information on how a student's refund would be calculated should he or she withdraw from the institution is vital to a student's assessment of whether to enroll or continue enrollment at an institution. Therefore, an institution must provide the information necessary for a student to make an informed and valid assessment. The Secretary does not believe it is unreasonable to expect an institution to provide reasonable examples of common refund situations applicable to the average student population, and answer any questions on this material, should a student request such information. The Secretary believes that the simplifications made to the refund section in response to public comment will make it easier for an institution to explain the refund policies to a student.

Changes: See specific changes to the refund sections.

Fair and Equitable Refund Policy

Comments: Thirteen commenters felt it is very burdensome to require an institution to calculate a student's refund under three refund policies. Eight commenters suggested that an institution be allowed to determine the refund that is generally the most generous (for example, with the use of charts that show the refund due based on the number of weeks remaining) and use it for all students who withdraw. One commenter supported the requirement that an institution calculate every student's refund under each applicable policy for comparison purposes.

Discussion: The Secretary continues to assert that the individual calculation of all possible refunds for each withdrawing student is the only possible means by which an institution can determine which refund calculation provides the largest amount, as required by law. Further, the Secretary notes that it would be difficult for an institution to determine that one particular policy always provided the most generous refund as refund amounts vary based on the unpaid amount of an individual student's scheduled cash payment.

The Secretary understands that institutions would prefer a simple predetermined chart or other reference aid that would enable them to complete a refund calculation without doing a student-by-student analysis. However, several variable items must always be examined. For example, the institution generally is required to determine the amount of funds it has earned under its enrollment contract with the student, and then return the unearned funds using the allocation priorities set out in § 668.22(h). In some cases, the institution may only have earned the funds under the contract that were allocated to be paid by the student (i.e., the funds remaining under the contract after the unearned portion has been returned). In this situation, whether the institution gets to keep any of the funds for this student already in its possession will depend solely upon whether the student has already paid his or her share of the contract price. For these calculations, even though the institution might be able to develop a chart showing what has been earned under the enrollment contract during the refund period, a student-by-student calculation must also be made to determine whether the student has already paid his or her share of the contract that the institution has earned. Different variables are present in the pro rata refund calculation that require student-by-student determinations, because the amount of the refund is reduced by the amount of any unpaid charges on the enrollment contract at the time of withdrawal. For this reason, some degree of student-by-student analysis would be required for every refund calculated under these regulations.

The Secretary would like to clarify the process of determining which refund policies to use when calculating a refund for a student. For a *first-time student* who withdraws on or before the 60 percent point in time in the period of enrollment for which the student has been charged, an institution must: (1) Calculate a refund under the pro rata refund calculation; (2) Compare this refund amount with refunds calculated under applicable State law and in accordance with the institution's accrediting agency's policy, if any. If either the State policy or the accrediting agency policy does not exist, the institution would compare the pro rata refund amount with the refund amount calculated under the remaining policy. For example, if no accrediting agency refund policy exists, the institution would compare the pro rata refund amount with the refund calculated in accordance with the State refund policy; (3) If there is no State refund policy *and* no accrediting agency policy (i.e., nothing with which to compare the pro rata refund amount), use the pro rata refund amount as the student's refund. (An institution is never required to use the refund calculation under Appendix A, Standards for Acceptable Refund Policies by Participating Institutions, for a first-time student who withdraws on or before the 60 percent point in time in the period of enrollment for which the student has been charged. [As discussed later, the Federal refund calculation will replace Appendix A, Standards for Acceptable Refund Policies by Participating Institutions, for the 1995–96 award year and beyond.])

For a *continuing student* (the pro rata refund policy does not apply), an institution must: (1) Compare refunds calculated under applicable State law and in accordance with the institution's accrediting agency's policy, if any. If one of these policies does not exist, the institution would use the remaining policy to arrive at the refund amount. No other refund calculation is necessary. (2) If there is no State refund policy *and* no accrediting agency refund policy, then (and only then) must the institution compare refunds calculated in accordance with Appendix A,

Standards for Acceptable Refund Policies by Participating Institutions, [the Federal refund calculation for the 1995–96 award year and beyond] and the institution's refund policy.

Changes: None.

Comments: Two commenters contended that it was inaccurate to refer to accrediting agency standards that are approved by the Secretary as the Secretary will not be approving the refund standards of accrediting agencies.

Discussion: The Secretary would like to clarify that an accrediting agency must have its refund policy approved by the Secretary before an institution may use an accrediting agency's refund policy to calculate a student's refund under the requirements of this section. In approving an accrediting agency's policy, the Secretary will look at factors such as whether the accrediting agency's specific refund standards: require an institution to make a refund of unearned tuition, fees, room and board, and other charges to a student who received Title IV, HEA program assistance, or whose parent received a Federal PLUS loan or Federal Direct PLUS loan on behalf of the student, if the student withdraws from the institution; include standards that specify the percentage of funds that will be refunded to a student (or retained by the institution) specific to the point in time that the student withdraws from the institution; and address the treatment of all charges specified in the law.

Changes: None.

Comments: One commenter requested that an institution be permitted to exclude administrative fees from refunds calculated under policies other than the pro rata refund policy.

Discussion: The Secretary notes that current regulations do not prohibit a State, accrediting agency, or institution (if the institution is comparing its own policy with a refund under Appendix A, Standards for Acceptable Refund Policies by Participating Institutions, [the Federal refund calculation for the 1995–96 award year and beyond]) from developing refund policies that permit institutions to exclude administrative fees. The Secretary does not plan to regulate in this area unless necessary to stem abuse. The Secretary notes that the Federal refund calculation also permits an institution to exclude an administrative fee from the calculation of the refund. The Federal refund policy is discussed in the section of *Analysis of Comments and Changes* that addresses comments received on Appendix A, Standards for Acceptable Refund Policies by Participating Institutions.

Changes: None.

Pro Rata Refund

Comments: Two commenters supported the required calculation of pro rata refunds for students who withdraw on or before the 60 percent point in time in the period of enrollment for which the student has been charged. One commenter felt that permitting institutions to subtract any unpaid institutional charges from the initial pro rata refund amount is unfair since it encourages students to withhold payment of the unpaid charges.

Discussion: The Secretary notes that the statutory definition of a pro rata refund calls for the subtraction of unpaid charges from the calculated refund amount. The Secretary agrees that the statutory subtraction of unpaid charges from the refund amount may encourage students to withhold payment of unpaid charges. The Secretary is also concerned that this provision may encourage institutions to enroll students who are more likely to withdraw because Title IV, HEA program funds will be used to pay the first dollars earned under the enrollment contract rather than a student's contribution, should the student withdraw. However, the Secretary notes that this benefit to students is also consistent with the protections inherent in the extended length of the pro rata refund policy.

Changes: None.

Comments: One commenter supported the provision that allows a student to return equipment if it is in good condition allowing for reasonable wear and tear, and then have the amount the student paid for the equipment included as part of the pro rata refund. The commenter did not believe that there should be any other circumstances beyond health and sanitary reasons that would permit an institution to reject equipment that is returned by a student. One commenter felt that used books, even those in good condition, allowing for reasonable wear and tear, are not marketable and an institution should not be forced to include these in the calculation of a refund. One commenter suggested that the Secretary allow an institution to exclude equipment charges from the pro rata refund calculation if the equipment cannot be redistributed to a newly enrolled student upon his or her entrance into a program. This would include books with student names, but would not include transcription machines.

Discussion: The Secretary agrees that students should be permitted to return equipment and have the charge for the equipment included in the calculation of the student's refund barring any circumstances that would prevent the institution from reissuing the equipment. The Secretary believes that the determination of whether equipment can be reissued should remain with the institutions. However, the Secretary notes that institutions will be responsible for demonstrating that their policies for unreturnable equipment are reasonable, consistent and fair to the student. The Secretary does not believe it is reasonable or fair to the student to classify all used books as unreturnable. An institution must demonstrate that there are specific circumstances, beyond the fact that the book has been used by other students, that prevent the institution from reissuing the equipment. The Secretary does not believe that it is reasonable to classify a book with a student's name on it as unusable for other students.

Changes: None.

Comments: One commenter suggested that the definition of "other charges assessed by the institution" not include the documented cost for services provided by the institution as a convenience to the student. For example, a book charge would not be an institutional charge if the institution permitted the purchase of the books as a convenience and the book charge was not included in the enrollment agreement.

Discussion: The Secretary notes that, consistent with policy under the previous FFEL program regulations, an institution is required to include the full amount of charges for equipment in the calculation of a pro rata refund if a separate charge exists for the equipment by the institution or if the institution requires the student to purchase the equipment from a certain vendor. If an institution does not have a separate charge for equipment and the student has the option of purchasing the equipment from more than one source, the institution would not have to include the equipment charge in the pro rata refund calculation.

Changes: None.

Comments: One commenter stated that requiring that refunds be made within 30 days was unreasonable, in light of the proposed 20-day return period for equipment, books, or supplies. These commenters believed it is unfair to allow a student a 20-day period in which to return equipment, only to force the institution to rush the calculation and processing of a refund. The commenter suggested that a student

be allowed 15 days to return equipment so that the institution would have a more reasonable 15 days to process the refund.

Discussion: The Secretary does not believe that it is unreasonable to require an institution to make a refund within 30 days, even though an institution may not know if equipment is to be counted as returned or unreturned until the twentieth day. The Secretary notes that the return of equipment is only one area of a refund calculation. The Secretary believes that 10 days is sufficient time for an institution to complete the calculation of a refund and make any refund due to a student.

Changes: None.

Comments: Two commenters believed that the administrative fee should not be required to be a real institutional charge to students. One commenter believed that an institution should be permitted to count a withdrawal fee as part or all of an administrative fee.

Discussion: The pro rata refund calculation determines what portion of institutional charges paid can be retained by the institution; the Secretary believes it is unreasonable to allow the retention of a fee that was not actually charged or paid. An institution may count a charge as part of this administrative fee if the charge is used to cover administrative work at the institution. The fee must be publicized up-front and applied across the board to all students. Because a withdrawal fee is only charged to those students who withdraw and not to all students, it may not be included in an institution's administrative fee.

Changes: None.

Comments: Three commenters suggested that the Secretary add the provision of the February 28, 1994 NPRM that would have allowed an institution to exclude board credits in excess of the attributable prorated portion based on the period attended by the student prior to withdrawal. One commenter noted that the pro rata formula assumes that services are provided evenly throughout the term. The commenter suggested that the cost for all services that are provided on an uneven basis be excluded from the pro rata refund calculation if the institution can document that the service was provided in full. One commenter felt that the definition of "other charges assessed the student by the institution" should be modified to address charges that are collected by an institution and passed on to an outside entity (for example, physicals, required immunizations, outside housing deposits, uniform purchases, and bus passes). The commenter felt that an institution should not be required to pro rate these charges.

Discussion: The Secretary continues to find the provision contained in the February 28, 1994 NPRM allowing for the exclusion of expended board credits in excess of the attributable prorated portion based on the period attended by the student to be excessively complicated and not entirely effective for purposes of this section. The Secretary agrees that the statutory pro rata refund formula assumes that services are provided evenly throughout the term. The Secretary believes that excluding all institutional costs that are provided on an uneven basis from the pro rata refund calculation is contrary to the requirements of the law. The Secretary continues to believe that certain costs (i.e., passed-through room charges, and group health insurance fees) warrant treatment other than standard proration and has therefore specifically named such costs and permitted an institution to exclude the charges from the calculation. The Secretary believes the specific regulation of the treatment of these costs will avoid institutional abuse of these allowances and ensure greater equity in the payment of refunds. The Secretary does not believe it is appropriate to extend this treatment to all charges that are passed through the institution to another entity.

Changes: None.

Comments: Four commenters felt that requiring an institution to use hours completed instead of scheduled hours for purposes of calculating the 60 percent point in time ignores that institutions have to provide space, utilities and instruction, whether a student is in attendance or not. One commenter felt that this went against congressional intent which was clearly communicated through the use of the phrase "in time." The commenters felt that this penalizes the student with good attendance who withdraws by in effect charging him or her more than a student with poor attendance who withdraws. Two commenters felt that it is discriminatory to not allow a clock hour institution to determine the 60 percent point in time by using weeks, as credit hour institutions do. The commenters felt that this restriction does not permit a clock hour institution to factor in absences in determining the 60 percent point in time.

Discussion: Because a student's progression in a clock-hour program is measured solely in clock hours completed, the Secretary believes that it is most reasonable to use the number of hours completed by the student in determining the percentage of the enrollment period that has elapsed for these programs. In accordance with past guidance issued by the Department, excused absences may be counted when determining hours completed by the student if the institution has a written excused absence policy allowing for a reasonable number of absences which do not need to be made up to complete the program. If an institution's policy for excused absences is reasonable, the Secretary does not believe that an inequity in treatment will exist between a student with good attendance who withdraws and a student with "poor attendance" who withdraws. The Secretary acknowledges that this and other provisions of the Title IV, HEA programs differentiate between institutions based on whether programs are measured in clock or credit hours, and based on whether the institutions use standard terms. The Secretary notes that this differentiation is due to the Secretary's efforts to take into account the many variables and circumstances that exist in the postsecondary educational community.

Changes: None.

Comments: One commenter felt that it was discriminatory not to allow all institutions to use weeks to determine the portion of the period of enrollment that remains.

Discussion: The Secretary notes that the "portion of the period of enrollment that remains" is defined by statute.

Changes: None.

Period of Enrollment for Which the Student Has Been Charged

Comments: A few commenters requested a change to the definition of the minimum period of enrollment for which a student has been charged for clock-hour programs and credit-hour programs without terms. Seven commenters believed that it is unfair to define the minimum period of enrollment for which the student has been charged for a non-term institution as the lesser of the length of the educational program or an academic year. Six commenters felt that it was inconsistent for the Secretary to try to dissuade institutions from charging up front for a program, yet prohibit institutions with programs measured in clock hours or credit hours without terms from charging by anything less than the program length or an academic year. Several commenters were particularly concerned with this provision's effect on the calculation of a student's scheduled cash payment. The commenters noted that a student charged for a lengthy period of time is more likely to have a larger unpaid amount of his or her scheduled cash

payment. 13 commenters suggested that institutions be permitted to charge by the actual period of time for which the student is charged without the imposition of a minimum period. 12 commenters suggested that an institution be permitted to define its minimum period of enrollment for which a student has been charged as a payment period. Two supported the use of a month. One suggested the use of one-third of an academic year. Two commenters suggested that an institution that charges by the program be allowed to calculate refunds for an academic year (if the program is no longer than the academic year) because this will make it easier to determine the aid awarded.

Discussion: The Secretary believes that a definition of a minimum period of enrollment for which the student has been charged is crucial to preventing abuse in the making of refunds. The Secretary seeks to prevent institutions from establishing short periods to minimize the effectiveness of the pro rata refund requirements, which only apply to first-time students who withdraw on or before the 60 percent point in time in the period of enrollment for which the student has been charged. Upon further examination, the Secretary agrees that this goal may be achieved for programs measured in clock hours or credit hours without terms by permitting a shorter minimum period than that specified in the April 29, 1994 final regulations. The Secretary has established a minimum for programs that are longer than an academic year, and a minimum for programs that are shorter than an academic year. The Secretary believes that a minimum period of the greater of the payment period or one-half of the academic year is an appropriate minimum for a program that is measured in clock hours or credit hours and does not use terms that is longer than or equal to the academic year in length. The Secretary does not believe it is adequate to simply permit a minimum period equal to a payment period because the minimum length of a payment period is institutionally controlled. The Secretary believes it is reasonable to define the minimum period of enrollment for which the student has been charged in the case of an educational program that is measured in credit hours or clock hours and does not use terms and is shorter than the academic year in length, as the length of the educational program. The Secretary believes that these periods are sufficient to provide first-time students with the benefits of the pro rata refund provisions for a satisfactory period of time. The Secretary believes that these changes will also provide relief in the calculation of a student's scheduled cash payment. Scheduled cash payments are discussed further in the section of the *Analysis of Comments and Changes* that addresses "Repayments to Title IV, HEA Programs of Institutional Refunds and Repayments." The Secretary stresses that these minimum periods are to be used by institutions that charge by these periods, or periods less than the minimum. An institution that charges for periods longer than the minimum period specified in the regulations must use the period for which the institution actually charges the student as the period of enrollment for which the student has been charged. The Secretary believes it is reasonable for an institution that requires a student to commit to payment for an entire program to provide a refund based on that same period.

Changes: Section 668.22(e)(i) has been amended to define the minimum "period of enrollment for which the student has been charged" as the semester, trimester, quarter, or other academic term in the case of an educational program that is measured in credit hours or clock hours and uses semesters, trimesters, quarters, or other academic terms. Section 668.22(e)(ii) has been amended to define the minimum "period of enrollment for which the student has been charged" in the case of an educational program that is measured in credit hours or clock hours and does not use terms and is longer than or equal to the academic year in length, as the greater of the payment period or one-half of the academic year. Section 668.22(e)(ii) is also amended to define the minimum "period of enrollment for which the student has been charged" in the case of an educational program that is measured in credit hours or clock hours and does not use terms and is shorter than the academic year in length, as the length of the educational program.

Comments: 11 commenters believed that the minimum period of enrollment for which a student has been charged should be the term for clock-hour institutions using terms. The commenters felt that clock-hour institutions using terms should be treated the same as credit-hour institutions using terms. One commenter noted the need to ensure that the same time period is used for purposes of determining eligibility for student assistance and refund calculations.

Discussion: The Secretary agrees that the minimum period of enrollment for which a student has been charged should be the term for clock-hour programs using terms, as it is for credit-hour programs that use terms. The Secretary strongly agrees with the commenter who noted the need to ensure that the same time period is used for other Title IV, HEA program purposes. For example, the Secretary would expect an institution that states that it is a term-based institution for refund purposes to demonstrate that it has disbursed Title IV, HEA program funds to students as required for term-based institutions.

Changes: None.

Comments: One commenter felt that it is too difficult to determine the amount of funds received for the period of enrollment for which the student has been charged. The commenter requested that worksheets be provided to reflect the calculation of refunds and repayments without the use of attribution of funds.

Discussion: The Secretary notes that guidance on how to determine the amount of funds received for the period of enrollment for which the student has been charged was provided to institutions in the April 29, 1994 final regulations (59 FR 22356–22359). The Secretary will provide further guidance in the *Federal Student Financial Aid Handbook.*

Changes: None.

Repayments to Title IV, HEA Programs of Institutional Refunds and Repayments

Comments: 45 commenters understood and/or supported the rationale for the provision that requires that an institution subtract any unpaid amount of a scheduled cash payment from the amount the institution may initially retain under refund calculations other than pro rata. In particular, one commenter supported the shifting of liability from the Federal government to the institution. The commenter agreed with this approach because it makes more funds available to other students who stay in school. The commenter stated that they had always had a liberal refund policy and this provision will not affect the institution's operations and cash flow.

One hundred and forty-one commenters opposed the requirement as written. The commenters asserted that the unpaid charges provision unfairly leaves students owing large balances to the institution which would otherwise have been paid by Title IV, HEA program assistance, and that this result obviously is not fair and equitable under

the statute. Seven commenters believed that this provision flies in the face of the language of the statute which clearly states that unpaid charges are to be subtracted from the amount of a refund to a student, and does not require that an institution subtract unpaid charges from the amount the institution may retain. Eight commenters believed that an institution should not be required to subtract any unpaid amount of a scheduled cash payment from the amount the institution may retain before the institution compares the amount of refunds under State, accrediting agency and pro rata policies. Five commenters believed that institutions who use policies developed by States, accrediting agencies, or the institution itself that choose to use pro rata across the board should be permitted to subtract any unpaid charges from the amount of the refund.

Thirty-nine commenters felt that these provisions were not fair and equitable because institutions will be providing education for periods of time for which they will not receive compensation. One commenter felt that this provision will force institutions to raise tuition. Four commenters contended that this provision will force institutions to overfund students with loans or other types of aid. Three commenters felt that this provision would require institutions to demand payment in full at the start of classes. The commenters stated that demanding payment in full at the start of classes will either entirely exclude disadvantaged low-income students from access to education or cause institutions to reimburse the students when financial assistance arrives at a later date. One commenter felt that this provision will encourage institutions to lower their satisfactory progress standards and simplify curricula to reduce the number of early withdrawals, as the institutions are penalized when students withdraw before they have received most of their aid. Two commenters felt that this provision will result in institutions withholding a student's academic transcript until unpaid charges are paid.

Fourteen commenters contended that many of these students qualified for aid because they do not have the resources to pay for their own education (for example, a student with an EFC of 0) and, therefore, will not have the resources to pay an institution large amounts of unpaid charges. One commenter felt that the Secretary's intent with this provision was to exclude low-income individuals from participation in the Title IV, HEA programs, particularly for attendance at non-degree granting institutions. 11 commenters felt that this provision violates a student's entitlement to Title IV, HEA program assistance (particularly Federal Pell Grant funds) by requiring the student to assume responsibility for charges when they withdraw that they were not responsible for when they enrolled. One commenter stated that the Secretary appears to be in breach of a contract made with the student or, in the case of FFEL program funds, an interference with third-party contracts between the students and their banks. One commenter suggested that an institution not be required to return Federal Pell Grant funds if unpaid charges exist which the institution must collect from the student. One commenter felt that this provision also does not protect the institution or the FFEL program.

Discussion: The provision that requires that an institution subtract any unpaid amount of a scheduled cash payment from the amount the institution may initially retain under certain refund calculations was introduced to address an inequity which existed between students who paid their share of institutional charges, and those who did not. As demonstrated by examples set forth in the December 23, 1991 NPRM, all other things being equal, the student who did not pay his or her share of institutional charges received a greater benefit from Title IV, HEA program funds than the student who had paid. Under the current provision, Title IV, HEA program funds may no longer be used to pay for the amount owed by the student. This provision reaffirms the basic principle of student financial aid: the family (or student) makes its contribution first before financial aid is expended.

The Amendments of 1992 reinforced the Secretary's use of this provision by stating that an institution shall have in place a fair and equitable refund policy under which it returns unearned tuition, fees, room and board, and other charges. In keeping with prior practice as set out in the final regulations published on June 8, 1993, the Secretary has applied this analysis of what charges are earned against the enrollment contract executed between the student and the institution. After a determination is made of how much money the institution has earned against the total contract price, the unearned funds are returned to their sources in accordance with Section 485 of the HEA and Section 668.22(h) of the regulations.

In accordance with the Amendments of 1992, a modified procedure is used to calculate pro rata refunds for first-time students. Under this procedure, students receiving the benefit of the elongated refund period have the unpaid charges on the contract removed from the calculation in determining how much of the earned funds the institution keeps. In exchange for the longer pro rata refund period, this calculation provides some benefit to the institution because its earnings are paid from funds already received without regard to the unpaid charges on the contract.

The Secretary is unwilling to depart from the existing treatment of unpaid charges for all other refund calculations. The Secretary believes it is clear that Title IV, HEA program funds are provided for students who receive an education. The Secretary realizes that a certain percentage of students can be expected to withdraw or drop out of an institution for reasons beyond the control of the institution. However, the Secretary believes that all institutions, especially those with withdrawal rates that threaten the institution's financial health, must share responsibility for a situation that does not benefit the student or, if the student is a recipient of Title IV, HEA program funds, the taxpayer. The Secretary's intent was not to bar low-income individuals from access to education. However, the Secretary notes that providing a student with access to education is not beneficial if the student does not complete the educational program and is left with financial debt. The Secretary encourages institutions to properly counsel and, where appropriate, screen applicants for admission to the institution.

The Secretary expects that institutions will seek to reduce their losses of income through refunds by working to keep students enrolled rather than overburdening students with loans, raising tuition, or demanding payment in full for long periods of enrollment. Obviously, keeping students enrolled by lowering satisfactory academic progress standards and simplifying curricula to reduce the number of early withdrawals does not provide students with the skills necessary to market their education. The Secretary encourages institutions to charge by the minimum periods of enrollment specified in the regulations in order to reduce a student's liability should he or she withdraw from the institution. An institution may withhold a student's academic transcript until unpaid charges are paid if it so chooses. However, the Secretary notes that an institution may not withhold a student's financial aid transcript until unpaid charges are paid.

The Secretary notes that the receipt of all awarded Title IV, HEA program assistance (including Federal Pell Grant

funds) is intended to enable a student to complete a program. Indeed, the statute specifies that, should a student withdraw from an institution, any amount of a refund must first be returned to the Title IV, HEA program funds, including the Federal Pell Grant program, up to the full amount received from the programs. Prospective students and students in attendance should be informed of this fact.

Changes: None.

Comments: Four commenters asserted that pro rata was designed to afford first-time students who withdraw within the first 60 percent of a program with maximum protection. The commenters contended that Congress clearly intended that the pro rata refund policy be used for these students.

Discussion: The Secretary notes that the statute does not require that all first-time students who withdraw within the first 60 percent of a program be provided a refund under the pro rata refund calculation. To the contrary, the statute requires an institution to compare refund amounts under the pro rata calculation, the requirements of State law, *and* the specific refund standards of an institution's accrediting agency and make a refund of at least the largest amount.

Changes: None.

Comments: Nineteen commenters felt that defining the most generous refund as the policy that returns the most funds to sources of aid without regard to the amount a student owes to the institution is unreasonable and does not benefit the student. Six commenters felt that a debt to an institution for unpaid charges will prevent a student from continuing his or her education.

Discussion: The Secretary believes that the intent of section 485 of the HEA was to reduce a student's Title IV, HEA loan obligation when a student withdraws from an institution. The Secretary does not believe that it is better for the student to owe a debt on a Title IV, HEA program loan rather than owing money to the institution. A student who defaults on a Title IV, HEA program loan is barred from receipt of further Title IV, HEA program funds. This will most likely prevent the student from continuing his or her education at any other institution. Further, the Secretary believes that it is appropriate to require the return of funds to the Title IV, HEA programs, where they will be available to students who are continuing to receive an education.

Changes: None.

Comments: Seventeen commenters contended that a student's scheduled cash payment should be limited to the amount of institutional charges a student is responsible for paying at the beginning of the student's program; it should not include the amount of other sources of aid that was not received by the student at the time of withdrawal. The commenters suggested that scheduled cash payment be defined as the amount of institutional charges minus the amount of aid *awarded* to the student. One commenter suggested that, alternatively, an institution should calculate the percentage of costs to be paid by aid and by the student at the time of enrollment. The institution should apply the appropriate refund policy and retain no more than the percentage of the total amount the school has earned from each source. The commenter felt that this would ensure that both the government and the student pay their share of expenses while the school receives no more than the amount earned. One commenter asserted that an institution should only be required to hold a student accountable for any cash payments against institutional charges that are due at the time the student withdraws. One commenter asserted that this provision creates an inequity between students who have not received their financial aid at the same rate. Seventy-six commenters believed that a student's scheduled cash payment should be attributed to payment periods as it was in the past. The commenters feel that it is unreasonable to hold a student accountable for charges that were scheduled to be covered by sources of aid.

Discussion: The Secretary found that the recommended alternatives for calculating unpaid charges based on the amount of student financial assistance awarded to a student, rather than the amount of student financial assistance received by the student at the time of his or her withdrawal, did not adequately address all the areas of concern that are currently addressed by the existing provisions on unpaid charges. As stated previously, a refund is calculated by determining how much money the institution has earned against the total contract price, and then returning all unearned funds. The Secretary believes that this calculation must be based on information available at the time the student withdraws from the institution. Also, a student is awarded Title IV, HEA program funds under the assumption that the student will remain enrolled for at least the period for which the aid is awarded. Therefore, it is not accurate to use the amount of aid awarded to determine a refund for a student who has not met his or her enrollment obligation as this is not an accurate indicator of the amount of institutional costs for which a student should be held responsible at the time of his or her withdrawal. Although all Title IV, HEA program funds awarded may exceed institutional charges at the time of a student's enrollment, some of these funds may be disbursed to the student for noninstitutional costs. Further, for various reasons Title IV, HEA program funds awarded may not be received by the time the student withdraws. The Secretary believes that it is only at the point when a student withdraws that the unearned portion of institutional charges may be determined. In addition, the Secretary believes that changing the calculation of a student's unpaid charges to use the amount of aid awarded would encourage institutions to overload students with Title IV, HEA loans so that the Title IV, HEA program assistance awarded is always greater than or equal to institutional charges.

The Secretary believes that he has addressed some of the most vital concerns of the commenters by revising the definition of the period of enrollment for which the student has been charged for certain types of programs. The revisions will permit institutions who charge by the payment period for programs longer than or equal to an academic year that are measured in clock hours or credit hours and do not use academic terms to use the payment period to determine a student's refund, including the calculation of a student's unpaid charges. The payment period must be at least as long as one-half of the academic year. This change is discussed in more detail in the section of the *Analysis of Comments and Changes* that addresses the definition of "period of enrollment for which the student has been charged."

Changes: See changes to the definition of "period of enrollment for which the student has been charged."

Comments: Two commenters believe that it is unfair to require institutions to return funds to a student if the subtraction of unpaid charges from the initial amount the institution may retain is a negative amount.

Discussion: The Secretary notes that the regulations do not require an institution to return funds to a student if the subtraction of unpaid charges from the initial amount the institution may retain is a negative amount. The regulations require an institution to return the total amount of Title IV, HEA program assistance (other than amounts received from the FWS Program) paid for institutional charges if the amount of a student's unpaid charges is greater

than or equal to the amount that may be retained by the institution under the institution's refund policy.

Changes: None.

Comments: Four commenters believed that the unpaid charges provision directly contradicts the 85/15 regulations, that require an institution to derive no more than 85 percent of revenues from Title IV, HEA program funds. One commenter stated that the refund provisions count cash payments by students as the first funds used toward institutional charges, while the 85/15 calculation requires Title IV funds to be counted as the first funds used for payment. Two commenters stated that the 85/15 regulations require an institution to look to sources of income other than Title IV, HEA program assistance. On the other hand, the commenter feels that the unpaid charges provision requires an institution to move away from these other sources of aid since many institutions provide funds on a contingency basis. If a student who received aid on a contingency basis withdraws, he or she will be responsible for the amount of assistance that has not been received. One commenter stated that the late disbursement provision allows a State to withhold State aid until after the refund period. The commenter felt that the regulations should be changed so that a student is not held responsible for a State's failure to honor its aid commitment.

Discussion: The Secretary disagrees with the analysis used by these commenters. The calculation used for the 85/15 regulations makes no assumption concerning the order in which institutions receive funds, but only examines the composition of the total funds received by the institution as of the end of the award year. Furthermore, to the extent that these refund calculations require institutions to recover earned funds from sources other than Title IV assistance, institutions whose eligibility may be at risk under the 85/15 regulations may benefit from the increase in the percentage of funds received from sources other than the Title IV programs. The Secretary cannot control the extent to which other parties make aid available only on a contingency basis, and the institution will be primarily responsible for determining what steps are taken to ensure that it will be able to recover earned funds under its contract with the student.

The regulations permit an institution to count late disbursements of State aid to reduce a student's unpaid charges "in accordance with the applicable State's written late disbursement policies." The regulations set a maximum period of time (60 days) beyond which late disbursements of State aid will not be counted. States and other sources of student financial assistance set the requirements and procedures for the attainment of aid that they provide. If another source of assistance is not providing the assistance in accordance with applicable procedures, an institution must deal directly with that source to resolve the issue. The Secretary does not believe it is appropriate to interfere with these decisions. However, the Secretary encourages other sources of aid to keep the best interests of the students in mind.

Changes: None.

Comments: One commenter stated that they did not feel it was bad to charge students for a program up-front. The commenter noted that this benefits the student by ensuring that there will be no increases in institutional charges over the course of the program. Further, the commenter stated that these students are not actually required to pay the full amount of institutional charges up front, but billed throughout the program.

Discussion: How an institution chooses to charge a student is purely an institutional decision. However, as stated above, the Secretary encourages institutions to charge by the minimum periods of enrollment specified in the regulations in order to reduce a student's liability should he or she withdraw from the institution. The Secretary commends those institutions who seek to ensure that institutional charges are not raised over the course of a student's program. However, the Secretary believes that an institution can commit to keeping institutional charges static without holding students liable for the entire cost of a program up-front. The Secretary would like to clarify that in determining the period of enrollment for which the student had been charged, he is most concerned with a student's period of liability. For an institution that "contracts" with a student for an entire program, but bills the student in increments throughout the program, the institution may use the billing periods as the period of enrollment for which the student is charged provided that: (1) the student is not held liable for any amount beyond the billing period that he or she is currently attending; and (2) the billing periods meet the regulatory definition of "period of enrollment for which the student has been charged."

Changes: None.

Comments: Five commenters contended that an institution should be permitted to automatically credit to a student's account any portion of a refund that is scheduled to go to the student if the student had unpaid institutional charges. However, one of these commenters felt that an institution should be required to inform the student in writing that the portion of the refund that was to be returned to the student has been applied to unpaid institutional charges.

Discussion: Upon further examination, the Secretary has decided that it *is* permissible for an institution to automatically credit any calculated refund amount slotted for return to a student if the student owes a repayment of noninstitutional funds or has unpaid charges that he or she owes to the institution. Section 484B requires that an institution have in effect a fair and equitable refund policy under which the institution refunds *unearned* institutional charges. By using the amount of the refund due to a student to cover unpaid charges, an institution would be covering charges that had been *earned* by the institution for the portion of the period of enrollment for which the student was in attendance. The Secretary agrees that an institution must inform all students in writing that the portion of the refund that was to be returned to the student has been applied to unpaid institutional charges. Further, as this would be a part of an institution's refund policy, an institution must inform all prospective and currently enrolled students of this policy in the written statement required under § 668.22(a)(2). This change represents a change in policy and requires no change to regulatory language.

Changes: None.

Comments: Seven commenters requested that the Secretary reconsider the provision proposed in the February 28, 1994 NPRM that provided that an institution would not have to return any refund of $25 or less. One commenter suggested that the Secretary provide that an institution would not have to return any refund of $300 or less. The commenters felt that it is unreasonable to require an institution to expend the administrative resources necessary to make refunds of such a small amount. Two commenters felt that section 490 of the HEA does not preclude the Secretary from permitting this. The commenters felt that the bulk of the administrative costs of processing the refund do come after the refund is calculated. Further, the commenters stated that because the administrative fee is a small percentage of the charges, it does not cover the cost of processing the refunds.

Discussion: Upon further consideration and in response to commenters, the Secretary has decided to permit an institution to not pay a refund if the institution demonstrates that the amount of the refund would be $25 or less, provided that the institution has obtained written authorization from the student in the enrollment agreement to retain any amount of the refund that would be allocated to the Title IV, HEA loan programs. The Secretary notes that an institution would not have to actually calculate the refund to demonstrate that the amount of the refund would be $25 or less if the institutional charges are so low that it would not be possible to arrive at a refund of $25 or less. The Secretary agrees that, in instances where the total refund is demonstrated to be $25 or less, no refund is required of Federal Pell Grant funds or of Title IV, HEA loan funds, provided that the institution has obtained authorization from the student in the enrollment agreement to keep such loan funds. Because the return of funds to reduce a student's loan balance constitutes funds that the student will otherwise be required to repay, the institution cannot retain such funds without a student's permission. The institution must obtain permission from the student through the student's signature on an enrollment agreement that the institution may retain these funds. The enrollment agreement must clearly explain to a student that he or she is permitting the institution to retain the funds, rather than having the funds used to reduce the student's Title IV, HEA loan debt, should the student withdraw. Since the effective date of these regulations is July 1, 1995, institutions have sufficient time to incorporate any necessary changes into their enrollment agreements if they choose to avail themselves of this option. The Secretary believes that $25 is the most reasonable number suggested for establishing this threshold.

Changes: Section 668.22(g)(3)(iii)(B) has been added to provide that an institution does not have to pay a refund if the institution demonstrates that the amount of a refund would be $25 or less.

Allocation of Refunds and Overpayments

Comments: Two commenters stated that it was illegal to designate where funds must be returned after all Title IV, HEA program assistance sources have been satisfied. Fifty-six commenters felt it is unfair to ignore significant contributions by other sources of aid by requiring that the majority (if not all) of a refund is returned to the Title IV, HEA programs. Fifteen commenters requested that the Secretary return to the use of the fraction or adopt another method of proportionately allocating refunds to the Title IV, HEA programs and other sources of aid. The commenters felt that the current allocation of refunds inequitably treats other sources of aid that contribute equally to a student's education. One commenter felt that this provision provides institutions with an incentive to withhold disbursements of aid sources other than Title IV until after the student is no longer entitled to a refund. In addition, the commenter asserted that the provision provides a disincentive for other sources of aid to award assistance, as most likely none of the aid will be returned to its source when a student withdraws. One commenter contended that the statute did not require that the refund to the Title IV, HEA programs exceed the federal government's portion of financial aid received by the student, nor did it preclude use of the fraction.

Discussion: The Secretary notes that section 485(a)(1)(F) of the HEA specifies the order of return of funds after a refund has been calculated, including the return of funds to sources other than the Title IV, HEA programs. In fact, the Technical Amendments of 1993 changed section 485 of the HEA to specify that refunds may be returned to other sources of student assistance only after the refund is returned to the Title IV, HEA program funds in the specified order of allocation. The Secretary further notes that funds are to be returned to the Title IV, HEA programs (and other sources of aid) only up to the amount awarded to the student under those programs. The Secretary recognizes that some States, institutions, or private sources of aid may deliberately withhold funds from otherwise eligible students who have received Title IV, HEA program assistance. This is a decision over which the Secretary has no control.

Changes: None.

Refund Dates

Comments: One commenter felt that tutorial, computer assisted instruction, counseling, academic advising, study group notes, and/or dormitory records should be admissible forms of documentation for determining a student's last date of attendance.

Discussion: An institution may use documentation that it believes is appropriate to demonstrate that a student has remained in academic attendance through a specified point in time. The institution must demonstrate that a last date of class attendance is based on an event that the institution routinely monitors and is confirmed by an employee of the institution. With the exception of dormitory records, the examples listed above may be acceptable forms of documentation if the institution can demonstrate that they meet these requirements. The Secretary does not consider dormitory records to be a proper form of documentation of attendance as they indicate only that the student may have been physically present at the institution for a longer period of time without providing assurances that the student was attending classes.

Changes: None.

Comments: Fifty-two commenters felt strongly that a student who takes an approved leave of absence should not be counted as a withdrawal for refund and repayment purposes. Fourteen commenters stressed that there is a difference between a student who officially withdraws or drops out and a student who intends to continue his or her education in a program by taking a leave of absence from an institution. The commenters noted that frequently a student must take a leave of absence for circumstances beyond his or her control. Five commenters contended that this provision unfairly affects nontraditional students with child care needs, work scheduling problems, military reserve duty and/or short-term medical problems, and denies them the access to education that the student aid programs are supposed to guaranty. One commenter felt that this provision is unfair to students affected by natural disasters who are forced to take a leave of absence.

Several commenters described what they felt were unfair consequences of this provision. Thirty-two commenters felt that this provision creates too much additional paperwork and burden for institutions, lenders, and/or students since a refund must be processed, the lender informed of the withdrawal, and the student must reapply for Title IV, HEA assistance when he or she returns to the institution. Thirty-seven commenters believed that it is unfair to require a student to pay another origination fee to secure a Title IV, HEA loan upon re-enrollment. Nineteen commenters noted that it may be more difficult for a returning student who only has a short period of enrollment left to find a lender to make a loan for a small amount. One commenter noted that the process of canceling and reapplying for a loan is unduly complicated, especially where a student is crossing over award years. Twenty-five commenters felt that this provision will place a great financial burden on

students. Eight commenters believed that the financial and/or the administrative burden placed on students who take a leave of absence will cause more students to completely withdraw from the institution. Five commenters felt that this would increase the institution's withdrawal rate and, therefore, jeopardize the institution's administrative capability. Three commenters believed that this provision could cause institutions to not approve any leaves of absence, and therefore students would drop out. Six commenters contended that requiring the repayment of loan funds during a time of personal upheaval may cause students to be unable to return to school and increases the likelihood of default. Eight commenters felt that a student who takes a leave of absence will have his or her financial aid reduced below what the student requires. Three commenters contended that this provision will add costs to the Title IV, HEA programs.

A few commenters felt that this provision was unnecessary. One commenter noted that the student's loan funds will have to be paid back anyway if the student doesn't return to school. Two commenters felt that the Secretary should address the abuse of institutions not calculating a refund for students who do not return from a leave of absence by aggressively enforcing that provision, not by requiring a leave of absence to be treated as a withdrawal.

A few commenters made observations of the temporary nature of most leaves of absence and suggested limitations that the Secretary could place on leaves of absence to guard against abuse if the Secretary permitted an institution to consider students on certain leaves of absence to still be enrolled. Two commenters felt that interruptions caused by a leave of absence are usually temporary and are usually resolved in 30 to 60 days. One commenter noted that the regulations for the FFEL program prohibit an institution from charging a student for a leave of absence. The commenter noted that this provides an incentive to schools to be selective in granting a leave of absence. Two commenters suggested that the Secretary permit a student to take a leave of absence for 30 days or less without requiring that the student be counted as a withdrawal for refund purposes. One commenter suggested that a student be permitted to take one leave of absence not to exceed 60 days within an academic year or calendar year. One commenter suggested that if the student did not return from the leave of absence, the student's date of withdrawal would be the last date of attendance. One commenter stated that this would be similar to State law in Texas which allows a student to take a leave of absence for a minimum of three days and a maximum of thirty. State law also limits a student to one leave of absence every twelve months. Three commenters suggested that the Secretary could protect Title IV, HEA program funds by requiring that funds for a student on a leave of absence be held in an escrow account until the student returns. One commenter suggested that an institution be required to make a refund to a student who has not returned from a leave of absence within 30 days of the scheduled date of return or the date the student notified the institution that he or she did not intend to return from the leave of absence.

Discussion: Upon further consideration of the commenters' concerns, the Secretary has decided to allow institutions to treat a student on an approved leave of absence as enrolled for purposes of this section. In the April 29, 1994 final regulations, the Secretary stated that all students on a leave of absence must be treated as having withdrawn from an institution for purposes of calculating a refund in order to ensure consistency among the Title IV HEA programs, some of which considered the student to have withdrawn and some of which considered the student to still be enrolled. To achieve this consistency while addressing the concerns of the commenters, a student on an approved leave of absence is no longer considered to have withdrawn from an institution for purposes of all Title IV, HEA programs. Also, a Title IV, HEA program loan borrower on an approved leave of absence is not considered to have withdrawn from an institution, for purposes of terminating the student's in-school status. Although the Secretary is concerned with abuse in this area, the Secretary agrees that requiring an institution to treat a student on a leave of absence as having withdrawn from the institution in all cases is unduly burdensome, both administratively and financially, for the student, the institution, and lenders. The Secretary notes that it is the practice of the Department to provide specific relief to students and institutions affected by certain natural disasters. An institution is not permitted to waive statutory and regulatory requirements unless otherwise permitted to do so by regulation or law.

The Secretary agrees that certain limitations need to be set on the granting of leaves of absences by institutions. The Secretary agrees with the commenter that suggested that an approved leave of absence be limited to 60 days and that only one leave of absence be granted to a student within any twelve-month period. As stated previously, the Secretary believes it is clear that Title IV, HEA program funds are designed for students who are receiving an education. Although the Secretary agrees that absences for short periods of time (60 days or less) may be necessary, the Secretary believes it is unfair to the taxpayer and other students to tie up Title IV, HEA funds for students who will not be receiving any education for an extended period of time. The Secretary also believes that the likelihood that a student will return to an institution from a leave of absence decreases as the length of the leave of absence increases. The Secretary does not believe that it is unreasonable to require a student who has been absent from an institution for over 60 days to reapply for Title IV, HEA program funds upon his or her return to the institution.

The Secretary also agrees with the commenter who felt that prohibiting an institution from charging a student for a leave of absence provides an incentive to schools to be selective in granting a leave of absence. Therefore, the Secretary requires that an approved leave of absence may not involve additional charges by the institution to the student. The Secretary also believes it is important to prevent falsification of leaves of absences. In order to have evidence that a student has requested a leave of absence the Secretary requires that, in order for a leave of absence to be approved, the student must request the leave of absence in writing.

The Secretary agrees with the commenter who suggested that if the student does not return from an approved leave of absence, the student's date of withdrawal should be the last date of attendance. The Secretary believes that, consistent with other provisions in this section, this last date of attendance must be documented by the institution. The Secretary believes this is also an appropriate date of withdrawal for a student who takes a leave of absence that is not approved in accordance with the regulations, as a student in this situation must be treated as a withdrawal for purposes of this section.

The Secretary agrees with the commenter who suggested that an institution be required to make a refund to a student who has not returned from a leave of absence within 30 days of the expiration of the leave of absence or the date the student notified the institution that he or she did not intend to return from the leave of absence, whichever is earlier.

The Secretary has also added provisions for the timely payment of a refund to a student who takes a leave of absence that is not approved in accordance with the regulations. If a student takes a leave of absence that is not approved in accordance with the regulations, the institution must pay a refund due to a student within 30 days after the last recorded date of class attendance, as documented by the institution.

Changes: Changes have been made to §§ 668.22(a)(1)(ii), (f)(1)(i), and (h)(2)(iv) to remove language that would have required an institution to treat a student on a leave of absence as a withdrawal for purposes of this section. Section 668.22(j)(1)(ii) has been amended to define the withdrawal date for a student who does not return to the institution at the expiration of an approved leave of absence or takes a leave of absence that is not approved, as the student's last recorded date of class attendance as documented by the institution. Section 668.22(j)(2) has been added to specify that a leave of absence is approved for purposes of this section if no other leave of absence has been granted within a twelve-month period, the leave of absence does not exceed 60 days, the student makes a written request to be granted the leave of absence, and the leave of absence does not involve additional charges by the institution to the student. Section 668.22(j)(4)(iii)(A) has been amended to require that an institution pay a refund that is due to a student who does not return to the institution at the expiration of an approved leave of absence, within 30 days of the date of expiration of the leave of absence. Section 668.22(j)(4)(iii)(B) has been added to require that an institution pay a refund that is due to a student who is taking an unapproved leave of absence, within 30 days after the student's last recorded date of class attendance as documented by the institution.

Appendix A, Standards for Acceptable Refund Policies by Participating Institutions

Comments: Four commenters contended that the requirement that institutions use the Appendix A, Standards for Acceptable Refund Policies by Participating Institutions refund policy when no State or accrediting agency standards exist and the pro rata refund policy does not apply further complicates the refund process and is unduly costly. Five commenters felt that the Secretary had exceeded his statutory authority by mandating use of Appendix A, Standards for Acceptable Refund Policies by Participating Institutions in certain situations to fix a loophole in the law. The commenters contended that any loophole must be fixed by changing the law.

Discussion: As the Secretary has consistently stated, the Secretary believes the Amendments of 1992 clearly give every student who receives Title IV, HEA program assistance the right to a fair and equitable refund as defined in the statute. The Secretary notes that there are instances wherein an institution's State and accrediting agency do not have specific refund policies and a particular student is not entitled to a *pro rata* refund. In such a case, the Secretary has afforded these students access to a fair and equitable refund policy as required by law. The Secretary is committed to providing an acceptable refund standard in the absence of all other standards.

Changes: None.

Comments: One commenter felt that the provisions of Appendix A, Standards for Acceptable Refund Policies by Participating Institutions are arbitrary, do not take into account the actual expenses incurred by students who withdraw, goes beyond the industry standard developed by the National Association of College and University Business Officers (NACUBO), and is not in conformance with generally acceptable accounting principles. The commenter noted that Appendix A, Standards for Acceptable Refund Policies by Participating Institutions does not address unofficial withdrawals. One commenter felt that the requirements of Appendix A, Standards for Acceptable Refund Policies by Participating Institutions are unnecessarily burdensome. In particular, the commenter contended that, while it is reasonable for an institution to have the amount of tuition to be refunded reviewed by the governing board and subject to consumer comment, it is unreasonable to require the same review of all decisions affecting institutional refund policies.

One commenter felt that it is impossible for an institution to comply with Appendix A, Standards for Acceptable Refund Policies by Participating Institutions if the institution is not allotted a reasonable period of time to implement the various administrative requirements. The commenter felt it was inexcusable that the Secretary did not provide an example of an Appendix A, Standards for Acceptable Refund Policies by Participating Institutions calculation in the preamble to the regulations.

Discussion: The Secretary agrees that certain aspects of Appendix A, Standards for Acceptable Refund Policies by Participating Institutions are unduly burdensome for institutions. The Secretary therefore decided to replace Appendix A, Standards for Acceptable Refund Policies by Participating Institutions with a Federal refund calculation incorporated into the regulations themselves. The percentage calculation of the refund under the Federal refund calculation has not changed from the calculation required under Appendix A, Standards for Acceptable Refund Policies by Participating Institutions of the April 29, 1994 final regulations. However, the Secretary has agreed to eliminate the majority of the administrative requirements of Appendix A, Standards for Acceptable Refund Policies by Participating Institutions from the Federal refund calculation. Instead, the Secretary believes it is reasonable to require an institution to use any applicable guidance for the calculation of a pro rata refund under this section to calculate a refund under the Federal refund calculation. The Secretary believes that this will reduce administrative burden for institutions because, by law, all institutions must be familiar with the pro rata refund requirements in order to calculate the pro rata refund for first-time students who withdraw on or before the 60 percent point in time in the period of enrollment for which the student has been charged. In addition to the reduction in institutional burden, these more limited provisions would continue to provide the Secretary with the protection necessary to reduce fraud and abuse.

The Secretary has therefore adopted the following provisions from the pro rata refund provisions in the Federal refund provisions: (1) An institution may exclude from the calculation of a Federal refund under this paragraph a reasonable administrative fee as defined by regulation; (2) As defined by regulation, an institution may exclude from the calculation of a Federal refund the documented cost to the institution of unreturnable equipment or of returnable equipment if the student does not return the equipment; (3) An institution may not delay its payment of the portion of a refund allocable to a Title IV, HEA program or a lender by reason of the process for return of equipment specified in the regulations; (4) "Room" charges do not include charges that are passed through the institution from an entity that is not under the control of, related to, or

affiliated with the institution; and (5) "Other charges assessed the student by the institution" do not include fees for group health insurance, if this insurance is required for all students and the purchased coverage remains in effect for the student throughout the period for which the student was charged. The Secretary expects institutions to follow any policy guidance issued for these areas of the regulations as it relates to the calculation of pro rata refunds.

As the commenter pointed out, Appendix A, Standards for Acceptable Refund Policies by Participating Institutions required that a refund be calculated for only those students who notified the institution in writing of their withdrawal. The Secretary has made the Federal refund calculation applicable to all students who withdraw from the institution. The Secretary believes that the HEA makes clear that students who withdraw from an institution for whatever reason are entitled to any refund owed in accordance with the law and applicable regulations, and therefore, corrects a provision that excluded students who do not officially withdraw from the institution from the benefits of a fair and equitable refund calculation.

As stated above, the Secretary agrees that certain administrative aspects of Appendix A, Standards for Acceptable Refund Policies by Participating Institutions are unduly burdensome for institutions. Therefore, for the 1994–95 award year, the Secretary expects an institution to be able to demonstrate that it has made (and will continue to make) an effort to implement as many of the administrative aspects of Appendix A, Standards for Acceptable Refund Policies by Participating Institutions as it reasonably can until these regulations become effective. However, the Secretary expects that all institutions that are required to calculate refunds under Appendix A, Standards for Acceptable Refund Policies by Participating Institutions have properly calculated the percentage of institutional charges that must be refunded.

Changes: Section 668.22(b)(1)(iv) has been changed to require that, if the pro rata refund calculation does not apply and no State or accrediting agency refund standards exist, an institution must provide a refund of at least the larger of the institution's refund policy or the Federal Refund Calculation specified in this section, instead of the refund standards contained in Appendix A, Standards for Acceptable Refund Policies by Participating Institutions to this part. Accordingly, Appendix A, Standards for Acceptable Refund Policies by Participating Institutions has been removed from this part.

A new section 668.22(d) has been added to define the Federal refund calculation.

Comments: Two commenters felt that no appropriate rationale was provided for the required calculations of a refund under Appendix A, Standards for Acceptable Refund Policies by Participating Institutions. The commenters reasoned that since Appendix A, Standards for Acceptable Refund Policies by Participating Institutions was created to provide a standard until the approval of accrediting agency standards is completed, and accrediting agency standards are not being approved, the purpose of Appendix A, Standards for Acceptable Refund Policies by Participating Institutions is moot and it should be deleted. One commenter felt that requiring institutions to provide refunds for students through the 50 percent point seems extreme and may force an institution to reduce or eliminate services required under administrative capability such as counseling, job placement and academic advisement. One commenter felt it is unreasonable to expect an institution to meet the standards of section VIII (the actual calculation of the refund amount) as it would mean expending significant effort for a result that did not significantly affect students. The commenter cited no more than a 12 percent difference between the refund amount provided under Appendix A, Standards for Acceptable Refund Policies by Participating Institutions and the refund amount provided under its institutional policy. Four commenters felt that the refund requirements of Appendix A, Standards for Acceptable Refund Policies by Participating Institutions should not extend beyond the 20 percent point in time in the period of enrollment for which the student has been charged or only through the third week of instruction. The commenter felt that measuring in weeks is easier for an auditor to follow.

Discussion: As stated in the February 28, 1994 NPRM, the Secretary sought to develop a refund policy that provides a reasonable amount of protection for continuing students. The Secretary adapted a proportionate calculation that is similar to refund policies used by many proprietary institutions. The Secretary does not believe it is unreasonable to provide a student with a refund of at least 25 percent of institutional charges if the student withdraws between the 25 percent and the 50 percent point in the student's period of enrollment for which the student has been charged. Although one commenter noted that the refund amount did not vary greatly from the amount provided under its institutional refund policy, the Secretary has had experience with institutional refund policies that are far from adequate. The Secretary has not specified how an institution must determine the point in time that a student has withdrawn from the institution for purposes of a Federal refund calculation. However, the Secretary encourages institutions to follow the requirements of § 668.22(b)(2) that delineate how an institution must determine the 60 percent point in time for purposes of determining if a student is eligible for a pro rata refund.

The Secretary does not agree with the commenters who reasoned that since Appendix A, Standards for Acceptable Refund Policies by Participating Institutions was created to provide a standard until the approval of accrediting agency standards is completed, and accrediting agency standards are not being approved, the purpose of Appendix A, Standards for Acceptable Refund Policies by Participating Institutions is moot and it should be deleted. To the contrary, because the Department chose not to mandate that all accrediting agencies have refund policies, the Secretary is even more concerned that continuing students who are not guaranteed protection under an accrediting agency policy (and when a State policy does not exist) be provided with a fair and equitable refund. The Secretary continues to encourage institutions and accrediting agencies and States to work together in developing refund standards which can be better suited to the particular needs and circumstances of individual institutions. As noted above, the administrative requirements of Appendix A, Standards for Acceptable Refund Policies by Participating Institutions have not been carried over to the Federal refund calculation that will be in effect for the 1995–96 award year and beyond.

Changes: See discussion on the removal of Appendix A, Standards for Acceptable Refund Policies by Participating Institutions above.

Section 668.23 Audits, Records, and Examinations

Comments: One commenter suggested that all of the audit requirements, both financial and compliance, be placed under a single section in the regulations to facilitate an institution's ability to understand all of the new audit requirements.

Discussion: The Secretary does not believe that the centralization of the financial and compliance audit requirements would make comprehension of those requirements easier for the affected parties. On the contrary, the Secretary believes that by providing separate sections in the regulations for the financial audit requirements and the compliance audit requirements, institutions and third-party servicers are more easily able to determine which requirements apply to them because the section contents are smaller and therefore easier to understand.

Changes: None.

Comments: Five commenters suggested that a third-party's cooperation with certain entities in the conduct of audits, investigations, and program reviews authorized by law of the servicer should only take place during the course of a review of a specific institution that contracts with the servicer. The commenters believed that audits, investigations, and program reviews of third-party servicers should only be used for the purpose of reviewing the compliance of the institution that contracts with the servicer, and not the compliance of the actual third-party servicer.

Discussion: The Secretary does not agree with the commenters. Section 487(c) of the HEA specifically provides that a third-party servicer's administration of an institution's participation in the Title IV, HEA programs must be audited on an annual basis. Section 487(c) further provides for an emergency action or the limitation, suspension, or termination of the eligibility of a third-party servicer to contract with any institution. The Secretary interprets these statutory provisions to mean that third-party servicers are to be held accountable directly to the Secretary for violations by the servicer of Title IV, HEA program requirements. Therefore, the Secretary believes that third-party servicers must be required to cooperate with approved entities in the conduct of audits, investigations, and program reviews authorized by law of the servicer at any time and not just when an institution is being audited, investigated, or reviewed for program compliance.

Changes: None.

Comments: Five commenters suggested that references to the SPRE should be clarified to mean the SPRE for the State in which the institution that contracts with a third-party servicer is located. The five commenters further suggested that a SPRE should only be able to conduct a review of a third-party servicer if the SPRE has been requested by the Secretary to review the institution that contracts with the servicer.

Discussion: SPRE reviews are governed by the procedures set forth under 34 CFR part 667. Under those procedures, a specific SPRE may only review a third-party servicer that contracts with an institution that is located in the same State as that SPRE unless the institution has locations in more than one State. If the institution has locations in more than one State, then it is possible that a SPRE other than the SPRE in the State in which the institution is located may review a third-party servicer that contracts with the institution, pursuant to 34 CFR 667.9(e). A SPRE may conduct a review of an institution and its third-party servicers even if the institution was not referred to the SPRE by the Secretary pursuant to 34 CFR 667.6.

Changes: None.

Comments: Two commenters argued that third-party servicers should not be required to disclose the results of audits to entities other than the Department of Education and institutions receiving the third-party servicer's services. One commenter recommended that a third-party servicer should not be required to provide a copy of the servicer's audit to a guaranty agency unless the servicer is servicing a loan that was guaranteed by the agency. One commenter recommended striking the requirement that a third-party servicer should provide a copy of the servicer's audit to lenders in the FFEL programs. The commenter believed that if a third-party servicer has a business relationship with a lender participating in the FFEL programs, the lender would receive a copy of the servicer's audit under their contractual agreement. Five commenters recommended that third-party servicers should only be required to provide copies of audits to those entities that are reviewing an institution that has a contract with the servicer. The commenters believed that this would limit the access of confidential information.

Discussion: The Secretary disagrees with the commenters. Under section 487(c)(6) of the HEA, the Secretary is authorized to provide information obtained as a result of audits conducted under section 487(c) to guaranty agencies, lenders, accrediting agencies, the Secretary of Veterans Affairs, and SPREs under subpart 1 of part H of Title IV. The Secretary believes that by providing information-sharing among the appropriate authorized entities that the Secretary relies on to help provide oversight of Title IV, HEA program participants, the Secretary is responding to Congressional intent. A third-party servicer acts as an agent of the institution and is responsible for administering a portion of an institution's participation. As such, the various entities involved in program oversight will have a genuine need for access to records of, or information about, the servicer. The Secretary therefore considers that the audit results of third-party servicers must be included in the information available to the appropriate oversight bodies monitoring institutional compliance with Title IV, HEA program requirements.

Changes: None.

Comments: One commenter was concerned that third-party servicers are required to disclose privileged client information under this section to the Secretary or officials designated by the Secretary without the applicable client's knowledge. The commenter believed that this requirement could subject the servicer to a significant liability exposure. The commenter suggested that institutions be notified before the information is released.

Discussion: Third-party servicers as agents of an institution are required to provide access to all records or other information applicable to the third-party servicer's administration of any aspect of an institution's participation in the Title IV, HEA programs. A third-party servicer is not required to provide to the Secretary or to officials designated by the Secretary, any additional information that an institution itself is not required to provide to the Secretary to remain in compliance with the Title IV, HEA program requirements. An institution thus has no legitimate expectation that information regarding its compliance or non-compliance would be withheld from the Secretary. Since a third-party servicer provides access to information pursuant to regulation and statute, there should be no liability exposure to the servicer.

Changes: None.

Comments: One commenter believed that a review of financial statements prepared by a certified public accountant (CPA) should take the place of a comprehensive compliance audit of an institution's participation in the Title IV, HEA programs.

Discussion: Section 487(c)(1) of the HEA specifically requires that institutions have performed annually an audit that examines an institution's participation in the Title IV, HEA programs. The Secretary does not believe that a financial audit alone is sufficient where large amounts of Title IV, HEA program funds are disbursed to students through the institution

although the Secretary does consider the audit requirement to be satisfied if the audit is conducted in accordance with the Single Audit Act or OMB Circular A–128 or A–133. The Secretary will continue to review the concept of a single audit, for those institutions that do not submit an audit in accordance with the Single Audit Act or OMB Circular A–128 or A–133, that covers both the financial and compliance audit standards and may in the future adopt a single audit concept for those institutions upon further review of the new audited financial statement requirements under § 668.15.

Changes: None.

Comments: One commenter requested that the Secretary clarify if the audit requirements of § 668.23 and § 682.416(e) were intended to be the same. If the requirements were intended to be the same, the commenter requested that § 682.416(e) be modified to be consistent with § 668.23. If the requirements were not intended to be the same, the commenter requested that the regulations clearly delineate the differences between the requirements.

Discussion: Section 487(c)(1)(C) of the HEA mandates that third-party servicers of institutions, lenders, or guaranty agencies must have performed an annual audit of the servicer's administration of any aspect of the administration of the institution's, lender's, or guaranty agency's participation in the Title IV, HEA programs. Because third-party servicers of institutions contract with an institution to administer aspects of the institution's participation in the Title IV, HEA programs, the Secretary believes that it is only logical that third-party servicers of institution should be required to have the same audit requirements as institutions. Likewise, it is only logical that third-party servicers of lenders or guaranty agencies are required to comply with applicable audit requirements for those entities. The Secretary believes that the regulations adequately address the individual requirements for third-party servicers that contract with institutions and third-party servicers that contract with lenders or guaranty agencies.

Changes: None.

Comments: One commenter requested that the regulations provide for a single audit report to cover a third-party servicer's participation in all of the Title IV, HEA programs, including the FFEL programs.

Discussion: The Secretary disagrees with the commenter. Third-party servicer audits for institutions need to be separate from third-party servicer audits for lenders or guaranty agencies because third-party servicers of institutions provide markedly different services for their clients than third-party servicers of lenders or guaranty agencies do for their clients.

Changes: None.

Comments: Five commenters recommended that the regulations clarify that an institution could use a third-party servicer's audit, under § 668.23(c)(1)(iii), to satisfy the institution's obligation to have an audit performed of its compliance with Title IV, HEA program requirements in those areas that the servicer has contracted to provide services.

Discussion: The Secretary disagrees with the commenters. Institutions may not use the audits of their third-party servicers to satisfy the institution's obligation to have an audit performed of the institution's compliance with Title IV, HEA program requirements in those areas that the institution has contracted out to its third-party servicer. Institutions are fiduciaries of the funds received from the Federal government and institutions may not delegate their fiduciary responsibility to a third-party servicer because the institution is ultimately liable for any program violations incurred by itself or by its third-party servicer. Therefore, an institution must have performed an audit that covers the institution's entire participation in the Title IV, HEA programs, regardless of whether the institution uses a third-party servicer to help administer some or all aspects of the institution's participation in the Title IV, HEA programs. An audit of a third-party servicer only would be too limited in its scope. Such an audit would not address, for example, the internal control structure of the institution in those areas of the Title IV, HEA program administration that the institution delegated to its third-party servicer.

Changes: None.

Comments: One commenter believed that no audit could reasonably satisfy the requirement that a compliance audit cover every aspect of a third-party servicer's administration of an institution's participation in the Title IV, HEA programs. The commenter recommended that the regulatory language reflect those aspects of a third-party servicer's administration that will be included in the guide developed by the Department of Education's Inspector General. The commenter also recommended, in the case of a third-party servicer that contracts with more than one institution, that the auditor evaluate the effectiveness of the servicer's internal control structure over compliance with specified requirements, rather than compliance with all aspects of all requirements pertaining to the Title IV, HEA programs. The commenter believed that this approach would provide appropriate assurance of compliance in a cost effective manner.

Discussion: The Secretary agrees with the commenter that the language in the April 29, 1994 final regulations is somewhat broad and can be more specifically focused. The Secretary did not intend an audit of a third-party servicer to be broader than an audit of an institution. The Secretary believes that a third-party servicer should only be held to the same compliance audit standards as institutions since a third-party servicer contracts with an institution to act as an agent of the institution to administer the Title IV, HEA programs on the institution's behalf. As with an institution, the compliance audit standards for which a third-party servicer will be audited will include a review of the third-party servicer's internal control structure over the servicer's compliance with applicable Title IV, HEA program requirements.

Changes: A change has been made. Section 668.23(c)(1)(ii) has been amended to specify that a third-party servicer shall have performed at least annually a compliance audit, meeting the compliance audit standards for institutions, of the servicer's administration of the participation in the Title IV, HEA programs of each institution with which the servicer has a contract. In addition, § 668.23(c)(1)(iii) has similarly been amended to parallel the change to § 668.23(c)(1)(ii).

Comments: Seven commenters requested that the Secretary provide for audit exceptions for low dollar volume third-party servicers as published in the February 17, 1994 NPRM. The commenters felt that consensus had been reached during negotiated rulemaking on this issue. Two commenters recommended that institutions that receive less than a million dollars in Title IV, HEA program assistance per year should only be required to file a "level 2" audit.

Discussion: The Secretary disagrees with the commenters. As previously stated in the final regulations published in the **Federal Register** on April 29, 1994, the Secretary believes that section 487(c) of the HEA requires institutions and third-party servicers to have performed, on an annual basis, a compliance audit of the institution's administration of its Title IV, HEA programs or a third-party servicer to have performed, on an annual basis, a compliance audit of the servicer's

administration of an institution's participation in a Title IV, HEA program.

Changes: None.

Comments: Four commenters supported the provision that requires a third-party servicer's first audit to cover the first full fiscal year after the effective date of the regulations as well as any period from the effective date to the start of the servicer's first full fiscal year. Five commenters believed that a third-party servicer's first audit should only include the servicer's first full fiscal year that begins after the effective date of the regulations.

Three commenters argued that the new audit requirements should take effect for the institution's first full fiscal year after the effective date of the regulations. One commenter recommended that the first submission of audit reports under the new regulations should not be required prior to January 1, 1995.

One commenter believed that the period covered by a third-party servicer's first audit should not begin until after an audit guide has been published by the Department of Education's Inspector General. Another commenter suggested that there should be some flexibility of the audit report due date because the audit guide had not been published.

Four commenters were concerned that the 120-day deadline for submission of compliance audit reports was not enough time for institutions with fiscal years ending on June 30 to have performed an audit of their participation in the Title IV, HEA programs. In addition, four commenters noted that the Fiscal Operations and Application to Participate (FISAP) report is not due until September 30 and therefore an auditor would not be able to complete a compliance audit report until after the submission of the FISAP report. One commenter recommended leaving the audit report due date at March 31. Two commenters recommended that the audit report due date be amended so that the audit report is not due until 120 days after receipt by the institution of the final FISAP edit from the Department of Education or, if applicable, in accordance with the deadlines established in the Single Audit Act.

One commenter recommended developing a cycle for submissions of audit reports that would take advantage of the full twelve months of the year with institutions that have outstanding audits being required to submit their reports first.

Four commenters argued that basing a compliance audit on a fiscal year did not make sense because compliance with the regulations could only be accomplished through an audit of a specific award year.

One commenter requested clarification as to which period of time the compliance audit was supposed to cover.

Five commenters recommended that the regulations should provide a third-party servicer with the option of being able to submit the servicer's audit report to the Secretary within six months after the end of the servicer's fiscal year if the servicer is required to have an audit performed under 34 CFR part 682. One commenter recommended that the due date for audit reports in this section should be changed to six months to be consistent with the audit due date established under the FFEL programs. One commenter recommended that the audit report deadline be extended from 4 months to 6 months.

Two commenters requested that the regulations specify that an audit conducted in accordance with OMB Circular A–133 would be due in accordance with the guidance provided in that circular. The commenters also requested that 34 CFR 682.416(e) be modified similarly.

Discussion: The Secretary has reexamined his position with regard to having an annual compliance audit performed on a fiscal year basis. Based on public comment, the Secretary believes that it is necessary to resume having the compliance audit based upon the award year, instead of a fiscal year, since most of the requirements in the Title IV, HEA programs are geared to the award year and must be examined within that context and time period. The Secretary believes that several commenters supported this change and appreciates the support from those commenters.

This change does *not* mean that the compliance audit report due date will now be tied to the award year. The Secretary believes that it is still appropriate to continue using the end of the institution's or third-party servicer's fiscal year as the basis for submitting the compliance audit reports. By tying the audit report due date to a fiscal year cycle, the Secretary believes that institutions and third-party servicers will have greater access to independent auditors because the fiscal years of institutions and third-party servicers are staggered and therefore not all institutions and third-party servicers will be submitting compliance audit reports at the same time.

The Secretary also agrees with those commenters who were concerned with the 120-day compliance audit report submission deadline and suggested changing the submission due date of the compliance audit report to six months after the end of the institution's or third-party servicer's fiscal year. The Secretary acknowledges that institutions whose fiscal year coincides with the award year may need more time after the final FISAP reconciliation to submit their compliance audit report. The Secretary believes that institutions and third-party servicers, as applicable, must be given a reasonable amount of time to have performed an annual compliance audit. Therefore, the Secretary will consider that an institution or third-party servicer has submitted its compliance audit report in a timely fashion if the compliance audit report is submitted within six months of the end of the institution's or third-party servicer's fiscal year. The Secretary believes that six months is sufficient time for an institution or third-party servicer to submit a compliance audit report. In addition, the submission deadline for this report now parallels the submission deadlines established for lenders and third-party servicers that contract with lenders or guaranty agencies. The Secretary notes that the submission due date for an institution's annual audited financial statement under 34 CFR 668.15 remains unchanged.

With respect to those comments that requested that the regulations clarify that an audit conducted in accordance with OMB Circular A–133 are due in accordance with the submission deadlines in that circular, the Secretary believes that the regulations are clear. Because the regulations specify that an audit conducted under the Single Audit Act or OMB Circular A–133 satisfies the annual compliance audit requirement, which includes submission dates for compliance audits, the Secretary does not believe that regulatory clarification is necessary.

Changes: Changes have been made. Section 668.23(c)(2)(ii) has been revised to specify that a third-party servicer's first audit must cover the third-party servicer's activities for the award year that begins on or after July 1, 1994, in which the servicer began administering any aspect of an institution's participation in the Title IV, HEA programs. In addition, § 668.23(c)(3) has been amended to specify that an institution's or third-party servicer's compliance audit must be submitted to the Department of Education within six months after the end of the institution's or servicer's fiscal year that ends on or after the most recently concluded award year for which the audit is performed.

Comments: One commenter believed that it was unreasonable to require foreign institutions to submit an audit report that covered the institution's participation in the Title IV, HEA programs back to when the institution first began to participate in the Title IV, HEA programs because of the long timeframes involved.

Discussion: The Secretary believes that the commenter has raised a valid point. Many foreign institutions have been participating in the Title IV, HEA programs since the enactment of the HEA and have never been required to submit a compliance audit report to the Department of Education. To require an audit report from a foreign institution to examine compliance with Title IV, HEA requirements back to the beginning of the foreign institution's participation would create undue burden on the foreign institution unless the foreign institution had only been participating in the Title IV, HEA programs for a short-time. The Secretary believes that a foreign institution should only be required to have performed an audit report that covers the foreign institution's participation in the Title IV, HEA programs for the two most recently concluded award years unless the Secretary has reason to require an audit report to cover a longer period of time which would be no longer than the five most recently concluded award years.

Changes: A change has been made. Under § 668.23(c)(2)(i)(B), a foreign institution's first audit report must cover the foreign institution's two most recently concluded award years or, if the foreign institution has been participating in the Title IV, HEA programs for less than two award years, the entire period of time since the foreign institution began to participate in the Title IV, HEA programs. However, the Secretary reserves the right to request a foreign institution's first audit report to cover up to the foreign institution's five most recently concluded award years if the Secretary has reason to believe that such coverage in the audit report will protect the Federal interest in the student financial assistance funds that are used by students to pay for their education at the foreign institution.

Comments: One commenter argued that the provisions in this section relating to a third-party servicer's responsibility to agree to allow its employees to be questioned in private raised questions of due process. Four commenters stressed that the presence of management is sometimes necessary to clarify the misconceptions of an employee who works in a limited area and is not fully aware of the entire procedure. One commenter also noted that this process could provide disgruntled employees an opportunity to damage a third-party servicer's credibility. Two commenters recommended that these provisions be stricken from the regulations.

Discussion: The Secretary has already responded to similar comments in the preamble to final regulations for 34 parts 600 and 668 that were published in the **Federal Register** on July 31, 1991 (56 FR 36682). The Secretary continues to disagree with these views and does not believe that these requirements impose any additional requirements beyond what is currently required for institutions that participate in the Title IV, HEA programs. Because a third-party servicer is an agent of an institution, voluntarily, the Secretary believes that the servicer must be subject to the same requirements that an institution is subject to in the conduct of audits, investigations, and program reviews that are authorized by law.

Changes: None.

Comments: One commenter recommended that the provisions relating to job placement recordkeeping in this section of the regulations should be removed. The commenter argued that the definition of a placement service was unclear and too broad. The commenter further believed that the issue of institutional claims regarding job placement of students was adequately addressed in other sections of the regulations and therefore was not needed in this section.

One commenter objected to the requirement that an institution establish and maintain records that are relevant to the institution's admission standards and that support the educational qualifications of each regular student admitted to the institution whether or not that student receives Title IV, HEA program assistance. The commenter believed that this requirement went beyond the type of records required to ensure an institution's compliance with sections 1201(a), 481 (b), and (c) of the HEA.

One commenter argued that the requirement to have available for review records required by the Title IV, HEA program regulations at the geographical location where the student will receive his or her degree or certificate of program or course completion is unnecessarily burdensome. The commenter argued that institutions with multiple branches or additional locations should not be required to house records at those additional sites; rather, the institution should be able to house their records in one central location. The commenter suggested that upon notification by the Secretary, an institution could provide the physical records at the appropriate geographical location and that computer records would always be readily available.

Discussion: The Secretary has taken the comment regarding removal of the job placement record retention provision under consideration and concluded that there is no need for the provision in this section of the regulations. The regulations contain other regulatory provisions governing job placement rates that require an institution to retain documentation to support job placement computations.

The Secretary disagrees with the commenter who objected to the requirement that an institution establish and maintain records that are relevant to the institution's admission standards and that support the educational qualifications of each regular student admitted to the institution whether or not that student receives Title IV, HEA program assistance. Section 1201(a)(1) of the HEA requires that an institution of higher education may only admit as regular students individuals that have a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate. The Secretary construes from this statutory authority that an eligible institution must document that each student that it admits is a regular student with a high school diploma or a recognized equivalent of a high school diploma, as that term is defined in 34 CFR 600.2, in order to comply with the statutory language in sections 481 (a), (b), (c), and 1201(a) of the HEA. However, upon further examination of these requirements, the Secretary believes that there is no need in regulation to differentiate between institutions whose programs are all fully eligible and institutions that have only some programs that are eligible. The Secretary believes that by simplifying the regulatory language in this area, that the mandates of Executive Order (E.O.) 12866 are being carried out, in terms of promulgating regulations that are easier to understand.

The Secretary also disagrees with the commenter who questioned the requirement that an institution have available for review records required by the Title IV, HEA program regulations at the geographical location where the student will receive his or her degree or certificate of program or course completion. Timely access to relevant records at a particular geographical location are very important to ensure appropriate oversight over institutional participation in the Title IV, HEA

programs. Ordinarily, program reviews and audits are conducted according to an established schedule. If an institution is on that schedule, the Department contacts the institution in advance and requests access to the institution's records. Every effort is made to accommodate the institution's schedule. However, at times, immediate access to an institution is warranted. An institution is expected to have its records organized and readily available at the geographical location where a student will receive his or her certificate or degree of program or course completion and should not object to providing prompt access to those records. It is essential for proper accountability that the independent auditor, the Secretary, the Department of Education's Inspector General, the Comptroller General of the United States, or their authorized representatives have immediate access to institutional records. Housing records at a location other than the geographical location where a student will receive his or her certificate or degree of program or course completion defeats the purpose of immediate access to Title IV, HEA program records and prevents the proper accountability of an institution's participation in the Title IV, HEA programs.

Changes: Changes have been made. Section 668.23(h)(1)(v), concerning institutional documentation and record retention of job placement rates for Title IV, HEA program student recipients, has been removed from the regulations. In addition, §§ 668.23(h)(2) (i) and (ii) have been removed and replaced by a single provision under § 668.23(h)(2) that incorporates both of the removed provisions, so that an institution shall establish and maintain records regarding the admission requirements and educational qualifications of each regular student enrolled in any eligible program offered by the institution, whether the student received Title IV, HEA program assistance or not.

Executive Order 12866

These final regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering the Title IV, HEA programs effectively and efficiently. Burdens specifically associated with information collection requirements for the April 29, 1994 final regulations were identified and explained in those regulations (approved by the Office of Management and Budget under control number 1840–0537).

In assessing the potential costs and benefits—both quantitative and qualitative—of these regulations, the Secretary has determined that the benefits of the regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Paperwork Reduction Act of 1980

Sections 668.3, 668.8, 668.15, 668.16, 668.22, and 668.23 contain information collection requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these sections to the Office of Management and Budget (OMB) for its review. (44 U.S.C. 3504(h))

These regulations affect the following types of entities that participate in the programs authorized under Title IV of the HEA: individuals, States, large and small businesses, for-profit institutions or other for-profit organizations, non-profit institutions, and public institutions. The Department needs and uses the information to enable the Secretary to improve the monitoring and accountability of institutions and third-party servicers participating in the Title IV, HEA programs.

Annual public collecting, reporting, and recordkeeping burden for this collection of information is estimated to decrease by 23,272 hours and 11,692 respondents from the 123,485 hours for 64,695 respondents estimated in the April 29, 1994 final regulations, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. These numbers represent aggregate totals. For further information contact the Department of Education contact person.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 3002, New Executive Office Building, Washington, D.C. 20503; Attention: Daniel J. Chenok. Comments on this burden estimate should be submitted by December 29, 1994.

List of Subjects

34 CFR Part 600

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Student aid.

34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Student aid.

34 CFR Part 682

Administrative practice and procedure, Colleges and universities, Loan programs—education, Reporting and recordkeeping requirements, Student Aid, Vocational education.

(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Federal Stafford Loan Program; 84.032 Federal PLUS Program; 84.032 Federal Supplemental Loans for Students Program; 84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 State Student Incentive Grant Program; 84.268 Federal Direct Student Loan Program; and 84.272 National Early Intervention Scholarship and Partnership Program. Catalog of Federal Domestic Assistance Number for the Presidential Access Scholarship Program has not been assigned.)

Dated: November 18, 1994.

Richard W. Riley,

Secretary of Education.

The Secretary amends Parts 600, 668, and 682 of Title 34 of the Code of Federal Regulations as follows:

PART 600—INSTITUTIONAL ELIGIBILITY UNDER THE HIGHER EDUCATION ACT OF 1965, AS AMENDED

1. The authority citation for Part 600 continues to read as follows:

Authority: 20 U.S.C. 1088, 1091, 1094, 1099b, 1099c, and 1141, unless otherwise noted.

2. Section 600.5 is amended by revising paragraph (e)(1) to read as follows:

§ 600.5 Proprietary institutions of higher education.

* * * * *

(e)(1) An institution shall substantiate the calculation required in paragraph (a)(8) of this section by having the certified public accountant who prepares its audited financial statement under 34 CFR 668.15 report on the

accuracy of the institution's calculation based on performing an agreed-upon procedures attestation engagement in accordance with the American Institute of Certified Public Accountants (AICPA) Statement on Standards for Attestation Engagements, and include that report as part of the audit report.

* * * * *

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

3. The authority citation for Part 668 continues to read as follows:

Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1094, 1099c, and 1141, unless otherwise noted.

4. Section 668.2 is amended by revising the definitions of "Academic year" and "Third-party servicer" in paragraph (b) to read as follows:

§ 668.2 General definitions

* * * * *

(b) * * *

Academic year: (1) A period that begins on the first day of classes and ends on the last day of classes or examinations and that is a minimum of 30 weeks (except as provided in § 668.3) of instructional time during which, for an undergraduate educational program, a full-time student is expected to complete at least—

(i) Twenty-four semester or trimester hours or 36 quarter hours in an educational program whose length is measured in credit hours; or

(ii) Nine hundred clock hours in an educational program whose length is measured in clock hours.

(2) For purposes of this definition—

(i) A week is a consecutive seven-day period;

(ii)(A) For an educational program using a semester, trimester, or quarter system or an educational program using clock hours, the Secretary considers a week of instructional time to be any week in which at least one day of regularly scheduled instruction, examinations, or preparation for examinations occurs; and

(B) For an educational program using credit hours but not using a semester, trimester, or quarter system, the Secretary considers a week of instructional time to be any week in which at least 12 hours of regularly scheduled instruction, examinations, or preparation for examinations occurs; and

(iii) Instructional time does not include periods of orientation, counseling, vacation, or other activity not related to class preparation or examinations.

(Authority: 20 U.S.C. 1088)

* * * * *

Third-party servicer: (1) An individual or a State, or a private, profit or nonprofit organization that enters into a contract with an eligible institution to administer, through either manual or automated processing, any aspect of the institution's participation in any Title IV, HEA program. The Secretary considers administration of participation in a Title IV, HEA program to—

(i) Include performing any function required by any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA, such as, but not restricted to—

(A) Processing student financial aid applications;

(B) Performing need analysis;

(C) Determining student eligibility and related activities;

(D) Certifying loan applications;

(E) Processing output documents for payment to students;

(F) Receiving, disbursing, or delivering Title IV, HEA program funds, excluding lock-box processing of loan payments and normal bank electronic fund transfers;

(G) Conducting activities required by the provisions governing student consumer information services in subpart D of this part;

(H) Preparing and certifying requests for advance or reimbursement funding;

(I) Loan servicing and collection;

(J) Preparing and submitting notices and applications required under 34 CFR part 600 and subpart B of this part; and

(K) Preparing a Fiscal Operations Report and Application to Participate (FISAP);

(ii) Exclude the following functions—

(A) Publishing ability-to-benefit tests;

(B) Performing functions as a Multiple Data Entry Processor (MDE);

(C) Financial and compliance auditing;

(D) Mailing of documents prepared by the institution;

(E) Warehousing of records; and

(F) Providing computer services or software; and

(iii) Notwithstanding the exclusions referred to in paragraph (1)(ii) of this definition, include any activity comprised of any function described in paragraph (1)(i) of this definition.

(2) For purposes of this definition, an employee of an institution is not a third-party servicer. The Secretary considers an individual to be an employee if the individual—

(i) Works on a full-time, part-time, or temporary basis;

(ii) Performs all duties on site at the institution under the supervision of the institution;

(iii) Is paid directly by the institution;

(iv) Is not employed by or associated with a third-party servicer; and

(v) Is not a third-party servicer for any other institution.

(Authority: 20 U.S.C. 1088)

* * * * *

5. Section 668.3 is amended by revising paragraph (c) and adding a new paragraph (d) to read as follows:

§ 668.3 Reductions in the length of an academic year.

* * * * *

(c) *Longterm reduction.* (1) The Secretary may grant the request of any institution that satisfies the requirements of paragraph (a) of this section for a longterm reduction in the minimum period of instructional time of the academic year. In making this determination, the Secretary considers circumstances including, but not limited to:

(i) A demonstration to the satisfaction of the Secretary by the institution of unique circumstances that justify granting the request;

(ii) In the case of a participating institution, demonstration that the institution awards, disburses, and delivers, and has since July 23, 1992, awarded, disbursed, and delivered, Title IV, HEA program funds in accordance with the definition of academic year in section 481(d) of the HEA;

(iii) Approval of the institution's nationally recognized accrediting agency or State body that legally authorizes the institution to provide postsecondary education, including specific review and approval of the length of the academic year for each educational program offered at the institution; and

(iv) The number of hours of attendance and other coursework that a full-time student is required to complete in the academic year for each of the institution's educational programs.

(2) An institution that is granted a reduction in the minimum of 30 weeks of instructional time for an academic year in accordance with paragraph (c)(1) of this section and that wishes to continue to use a reduced number of weeks of instructional time must reapply to the Secretary for a reduction whenever the institution is required to apply to continue to participate in a Title IV, HEA program.

(d) An institution may demonstrate compliance with paragraphs (b)(3) and

(c)(1)(ii) of this section by making arrangements that are satisfactory to the Secretary to repay any overawards that resulted from the improper awarding, disbursing, or delivering of Title IV, HEA program funds.

(Authority: 20 U.S.C. 1088)

6. Section 668.8 is amended by removing paragraph (j)(2) and redesignating paragraphs (j) (3) and (4) as (j) (2) and (3) and revising paragraphs (b)(3)(ii), (f)(2), (k)(1), and (k)(2) to read as follows:

§ 668.8 Eligible program.

* * * * *

(b) * * *

(3) * * *

(ii) For an educational program using credit hours but not using a semester, trimester, or quarter system, the Secretary considers a week of instruction to be any week in which at least 12 hours of regularly scheduled instruction, examinations, or preparation for examinations occurs; and

* * * * *

(f) * * *

(2) Subtract from the number of students determined under paragraph (f)(1) of this section, the number of regular students who, during that award year, withdrew from, dropped out of, or were expelled from the program and were entitled to and actually received, in a timely manner in accordance with § 668.22(j)(4), a refund of 100 percent of their tuition and fees (less any permitted administrative fee) under the institution's refund policy.

* * * * *

(k) * * *

(1) The program is at least two academic years in length and provides an associate degree, a bachelor's degree, a professional degree, or an equivalent degree as determined by the Secretary; or

(2) Each course within the program is acceptable for full credit toward that institution's associate degree, bachelor's degree, professional degree, or equivalent degree as determined by the Secretary, provided that the institution's degree requires at least two academic years of study.

* * * * *

7. Section 668.9 is revised to read as follows:

§ 668.9 Relationship between clock hours and semester, trimester, or quarter hours in calculating Title IV, HEA program assistance.

(a) In determining the amount of Title IV, HEA program assistance that a student who is enrolled in a program described in § 668.8(k) is eligible to receive, the institution shall apply the formula contained in § 668.8(l) to determine the number of semester, trimester, or quarter hours in that program, if the institution measures academic progress in that program in semester, trimester, or quarter hours.

(b) Notwithstanding paragraph (a) of this section, a public or private nonprofit hospital-based school of nursing that awards a diploma at the completion of the school's program of education is not required to apply the formula contained in § 668.8(l) to determine the number of semester, trimester, or quarter hours in that program for purposes of calculating Title IV, HEA program assistance.

(Authority: 20 U.S.C. 1082, 1085, 1088, 1091, 1141)

8. Section 668.12 is amended by revising paragraphs (b)(2) and (c)(1)(i) to read as follows:

§ 668.12 Application procedures.

* * * * *

(b) * * *

(2) Include in the institution's participation in a Title IV, HEA program—

(i) A branch campus that is not currently included in the institution's participation in the program; or

(ii) Another location that is not currently included in the institution's participation in the program, if the Secretary requires the institution to apply for certification under paragraph (c) of this section;

(c) * * *

(1) * * *

(i) Include in its participation in a Title IV, HEA program a location that is not currently included in the institution's participation in the program and that offers at least 50 percent of an educational program; or

* * * * *

9. Section 668.15 amended by revising paragraphs (b)(5), (7)(i) and (8)(i)(B), and (d)(1) and by adding a new paragraph (g) to read as follows:

§ 668.15 Factors of financial responsibility.

* * * * *

(b) * * *

(5) Except as provided in paragraph (d) of this section, in accordance with procedures established by the Secretary, submits to the Secretary an irrevocable letter of credit, acceptable and payable to the Secretary equal to 25 percent of the total dollar amount of Title IV, HEA program refunds paid by the institution in the previous fiscal year;

* * * * *

(7) * * *

(i)(A) Demonstrates at the end of its latest fiscal year, an acid test ratio of at least 1:1. For purposes of this section, the acid test ratio shall be calculated by adding cash and cash equivalents to current accounts receivable and dividing the sum by total current liabilities. The calculation of the acid test ratio shall exclude all unsecured or uncollateralized related party receivables;

(B) Has not had operating losses in either or both of its two latest fiscal years that in sum result in a decrease in tangible net worth in excess of 10 percent of the institution's tangible net worth at the beginning of the first year of the two-year period. The Secretary may calculate an operating loss for an institution by excluding from net income: extraordinary gains or losses; income or losses from discontinued operations; prior period adjustment; and, the cumulative effect of changes in accounting principle. For purposes of this section, the calculation of tangible net worth shall exclude all assets defined as intangible in accordance with generally accepted accounting principles; and

* * * * *

(8) * * *

(i) * * *

(B) Demonstrates at the end of its latest fiscal year, an acid test ratio of at least 1:1. For purposes of this section, the acid test ratio shall be calculated by adding cash and cash equivalents to current accounts receivable and dividing the sum by total current liabilities. The calculation of the acid test ratio shall exclude all unsecured or uncollateralized related party receivables.

* * * * *

(d) *Exceptions to the general standards of financial responsibility.* (1)(i) An institution is not required to meet the standard in paragraph (b)(5) of this section if the Secretary determines that the institution—

(A)(*1*) Is located in, and is legally authorized to operate within, a State that has a tuition recovery fund that is acceptable to the Secretary and ensures that the institution is able to pay all required refunds; and

(*2*) Contributes to that tuition recovery fund.

(B) Has its liabilities backed by the full faith and credit of the State, or by an equivalent governmental entity; or

(C) As determined under paragraph (g) of this section, demonstrates, to the satisfaction of the Secretary, that for each of the institution's two most recently completed fiscal years, it has made timely refunds to students in

accordance with § 668.22(j)(4), and that it has met or exceeded all of the financial responsibility standards in this section that were in effect for the corresponding periods during the two-year period.

(ii) In evaluating an application to approve a State tuition recovery fund to exempt its participating schools from the federal cash reserve requirements, the Secretary will consider the extent to which the State tuition recovery fund:

(A) Provides refunds to both in-state and out-of-state students;

(B) Allocates all refunds in accordance with the order delineated in § 668.22(h); and

(C) Provides a reliable mechanism for the State to replenish the fund should any claims arise that deplete the funds assets.

* * * * *

(g) *Two-year performance requirement.* (1) The Secretary considers an institution to have satisfied the requirements in paragraph (d)(1)(C) of this section, if the institution—

(i) Has not failed for the preceding 2 years to make timely refund payments or to demonstrate financial responsibility under this section, with such showing supported by its compliance audits and audited financial statements for the most recent 2-year period; and

(ii) Was not cited in a review report for either of those years, by the Secretary, a State postsecondary review entity designated under 34 CFR part 667, or other State agency, for its failure to make timely refunds or its failure to meet the federal financial responsibility standards during the preceding 2 years.

(2) If an institution is cited in an audit or review referenced in paragraph (g)(1)(i) for a condition that would no longer permit it to use the exemption in 668.15(d)(1), the institution must notify the Secretary of that fact within 30 days of receiving such notice from its auditor, and must take immediate steps to secure the letter of credit required under paragraph (b)(5) of this section.

* * * * *

10. Section 668.16 is amended by revising paragraphs (e) and (l) to read as follows:

§ 668.16 Standards of administrative capability.

* * * * *

(e) For purposes of determining student eligibility for assistance under a Title IV, HEA program, establishes, publishes, and applies reasonable standards for measuring whether an otherwise eligible student is maintaining satisfactory progress in his or her educational program. The Secretary considers an institution's standards to be reasonable if the standards—

(1) Are the same as or stricter than the institution's standards for a student enrolled in the same educational program who is not receiving assistance under a Title IV, HEA program;

(2) Include the following elements:

(i) A qualitative component which consists of grades (provided that the standards meet or exceed the requirements of § 668.7(c)), work projects completed, or comparable factors that are measurable against a norm.

(ii) A quantitative component that consists of a maximum timeframe in which a student must complete his or her educational program. The timeframe must—

(A) For an undergraduate program, be no longer than 150 percent of the published length of the educational program measured in academic years, terms, credit hours attempted, clock hours completed, etc. as appropriate;

(B) Be divided into increments, not to exceed the lesser of one academic year or one-half the published length of the educational program;

(C) Include a schedule established by the institution designating the minimum percentage or amount of work that a student must successfully complete at the end of each increment to complete his or her educational program within the maximum timeframe; and

(D) Include specific policies defining the effect of course incompletes, withdrawals, repetitions, and noncredit remedial courses on satisfactory progress;

(3) Provide for consistent application of standards to all students within categories of students, e.g., full-time, part-time, undergraduate, and graduate students, and educational programs established by the institution;

(4) Provide for a determination at the end of each increment by the institution as to whether the student has met the qualitative and quantitative components of the standards (as provided for in paragraphs (e)(2)(i) and (ii) of this section);

(5) Provide specific procedures under which a student may appeal a determination that the student is not making satisfactory progress; and

(6) Provide specific procedures for a student to re-establish that he or she is maintaining satisfactory progress.

* * * * *

(l) For an institution that seeks initial participation in a Title IV, HEA program, does not have more than 33 percent of its undergraduate regular students withdraw from the institution during the institution's latest completed award year. The institution must count all regular students who are enrolled during the latest completed award year, except those students who, during that period—

(1) Withdrew from, dropped out of, or were expelled from the institution; and

(2) Were entitled to and actually received in a timely manner, a refund of 100 percent of their tuition and fees (less any permitted administrative fee) under the institution's refund policy;

* * * * *

11. Section 668.22 is revised to read as follows:

§ 668.22 Institutional refunds and repayments.

(a) *General.* (1) An institution shall have a fair and equitable refund policy under which the institution makes a refund of unearned tuition, fees, room and board, and other charges to a student who received Title IV, HEA program assistance, or whose parent received a Federal PLUS loan or Federal Direct PLUS loan on behalf of the student if the student—

(i) Does not register for the period of enrollment for which the student was charged; or

(ii) Withdraws, drops out, is expelled from the institution, or otherwise fails to complete the program on or after his or her first day of class of the period of enrollment for which he or she was charged.

(2) The institution shall provide a clear and conspicuous written statement containing its refund policy, including the allocation of refunds and repayments to sources of aid to a prospective student prior to the earlier of the student's enrollment or the execution of the student's enrollment agreement. The institution must make available to students upon request examples of the application of this policy and inform students of the availability of these examples in the written statement. The institution shall make its policy known to currently enrolled students. The institution shall include in its statement the procedures that a student must follow to obtain a refund, but the institution shall return the portion of a refund allocable to the Title IV, HEA programs in accordance with paragraph (f) of this section whether the student follows those procedures or not. If the institution changes its refund policy, the institution shall ensure that all students are made aware of the new policy.

(3) The institution shall publish the costs of required supplies and equipment and shall substantiate to the

Secretary upon request that the costs are reasonably related to the cost of providing the supplies and equipment to students.

(b) *Fair and equitable refund policy.* (1) For purposes of paragraph (a) of this section, an institution's refund policy is fair and equitable if the policy provides for a refund of at least the larger of the amount provided under—

(i) The requirements of applicable State law;

(ii) The specific refund standards established by the institution's nationally recognized accrediting agency if those standards are approved by the Secretary;

(iii) The *pro rata* refund calculation described in paragraph (c) of this section, for any student attending the institution for the first time whose withdrawal date is on or before the 60 percent point in time in the period of enrollment for which the student has been charged; or

(iv) For purposes of determining a refund when the *pro rata* refund calculation under paragraph (b)(1)(iii) of this section does not apply, and no standards for a refund under State law under paragraph (b)(1)(i) and no standards established by the institution's accrediting agency under (b)(1)(ii) of this section exist, the larger of—

(A) The Federal refund calculation contained in paragraph (d) of this section; or

(B) The institution's refund policy.

(2) For purposes of the calculation of a *pro rata* refund under paragraph (b)(1)(iii) of this section, "the 60 percent point in time in the period of enrollment for which the student has been charged" is—

(i) In the case of an educational program that is measured in credit hours, the point in calendar time when 60 percent of the period of enrollment for which the student has been charged, as defined in paragraph (e) of this section, has elapsed; and

(ii) In the case of an educational program that is measured in clock hours, the point in time when the student completes 60 percent of the clock hours scheduled for the period of enrollment for which the student is charged, as defined in paragraph (e) of this section.

(3) The institution must determine which policy under paragraph (b)(1) of this section provides for the largest refund to that student.

(4) For all refund calculations other than the pro rata refund calculation under paragraph (b)(1)(iii) of this section, an institution must subtract the unpaid amount of a scheduled cash payment from the amount the institution may retain in accordance with paragraph (f)(2) of this section.

(c) *Pro Rata refund.* (1) "*Pro rata refund,*" as used in this section, means a refund by an institution to a student attending that institution for the first time of not less than that portion of the tuition, fees, room, board, and other charges assessed the student by the institution equal to the portion of the period of enrollment for which the student has been charged that remains on the withdrawal date, rounded downward to the nearest 10 percent of that period, less any unpaid amount of a scheduled cash payment for the period of enrollment for which the student has been charged.

(2) A "scheduled cash payment" is the amount of institutional charges that is not paid for by financial aid for the period of enrollment for which the student has been charged exclusive of—

(i) Any amount scheduled to be paid by Title IV, HEA program assistance that the student has been awarded that is payable to the student even though the student has withdrawn;

(ii) Late disbursements of loans made under the Federal Stafford Loan, Federal SLS, and Federal PLUS programs in accordance with 34 CFR 682.207(d), and allowable late disbursements of unsubsidized Federal Stafford loans and loans made under the Federal Direct Student Loan Program in accordance with 34 CFR 685.303(d); and

(iii) Late disbursements of State student financial assistance, for which the student is still eligible in spite of having withdrawn, made in accordance with the applicable State's written late disbursement policies. The late disbursement must be made within 60 days after the student's date of withdrawal, as defined in paragraph (j)(1) of this section, or the institution must—

(A) Recalculate the refund in accordance with this section, including recalculating the student's unpaid charges in accordance with this paragraph without consideration of the State's late disbursement amount; and

(B) Return any additional refund amounts due as a result of the recalculation in accordance with paragraph (h) of this section.

(3) The "unpaid amount of a scheduled cash payment" is computed by subtracting the amount paid by the student for the period of enrollment for which the student has been charged from the scheduled cash payment for the period of enrollment for which the student has been charged.

(4) An institution may exclude from the calculation of a *pro rata* refund under this paragraph a reasonable administrative fee not to exceed the lesser of—

(i) Five percent of the tuition, fees, room and board, and other charges assessed the student; or

(ii) One hundred dollars.

(5)(i) For purposes of this section, "other charges assessed the student by the institution" include, but are not limited to, charges for any equipment (including books and supplies) issued by an institution to the student if the institution specifies in the enrollment agreement a separate charge for equipment that the student actually obtains or if the institution refers the student to a vendor operated by the institution or an entity affiliated or related to the institution.

(ii) The institution may exclude from the calculation of a *pro rata* refund under this paragraph the documented cost to the institution of unreturnable equipment issued to the student in accordance with paragraph (c)(5)(i) of this section or of returnable equipment issued to the student in accordance with paragraph (c)(5)(i) of this section if the student does not return the equipment in good condition, allowing for reasonable wear and tear, within 20 days following the date of the student's withdrawal. For example, equipment is not considered to be returned in good condition and, therefore, is unreturnable, if the equipment cannot be reused because of clearly recognized health and sanitary reasons. The institution must clearly and conspicuously disclose in the enrollment agreement any restrictions on the return of equipment, including equipment that is unreturnable. The institution must notify the student in writing prior to enrollment that return of the specific equipment involved will be required within 20 days of the student's withdrawal.

(iii) An institution may not delay its payment of the portion of a refund allocable under this section to a Title IV, HEA program or a lender under 34 CFR 682.607 by reason of the process for return of equipment prescribed in paragraph (c)(5) of this section.

(6) For purposes of this section—

(i) "Room" charges do not include charges that are passed through the institution from an entity that is not under the control of, related to, or affiliated with the institution; and

(ii) "Other charges assessed the student by the institution" do not include fees for group health insurance, if this insurance is required for all students and the purchased coverage remains in effect for the student

throughout the period for which the student was charged.

(7)(i) For purposes of this section, a student attending an institution for the first time is a student who—

(A) Has not previously attended at least one class at the institution; or

(B) Received a refund of 100 percent of his or her tuition and fees (less any permitted administrative fee) under the institution's refund policy for previous attendance at the institution.

(ii) A student remains a first-time student until the student either—

(A) Withdraws, drops out, or is expelled from the institution after attending at least one class; or

(B) Completes the period of enrollment for which he or she has been charged.

(8) For purposes of this paragraph, "the portion of the period of enrollment for which the student has been charged that remains" is determined—

(i) In the case of an educational program that is measured in credit hours, by dividing the total number of weeks comprising the period of enrollment for which the student has been charged into the number of weeks remaining in that period as of the student's withdrawal date;

(ii) In the case of an educational program that is measured in clock hours, by dividing the total number of clock hours comprising the period of enrollment for which the student has been charged into the number of scheduled clock hours remaining to be completed by the student in that period as of the student's withdrawal date; and

(iii) In the case of an educational program that consists predominantly of correspondence courses, by dividing the total number of lessons comprising the period of enrollment for which the student has been charged into the number of lessons not submitted by the student.

(d) *Federal refund.* (1) "Federal refund," as used in this section, means a refund by an institution to a student attending that institution of not less than the portion of tuition, fees, room, board, and other charges assessed the student by the institution to be refunded as follows—

(i) The institution must refund 100 percent of the tuition charges, less an administrative fee that does not exceed the lesser of $100 or 5 percent of the tuition, if a student withdraws from the institution on or before the first day of classes for the period of enrollment for which the student was charged;

(ii) The institution must refund at least 90 percent of the tuition charges if the student withdraws between the end of the period of time specified in paragraph (d)(1) of this section and the end of the first 10 percent (in time) of the period of enrollment for which the student was charged;

(iii) The institution must refund at least 50 percent of the tuition charges if the student withdraws between the end of the first 10 percent (in time) of the period of enrollment for which the student was charged and the end of the first 25 percent (in time) of that period of enrollment; and

(iv) The institution must refund at least 25 percent of the tuition charges if the student withdraws between the end of the first 25 percent (in time) of the period of enrollment for which the student was charged and the end of the first 50 percent (in time) of the period of enrollment.

(2) An institution may exclude from the calculation of a Federal refund under this paragraph a reasonable administrative fee not to exceed the lesser of—

(i) Five percent of the tuition, fees, room and board, and other charges assessed the student; or

(ii) One hundred dollars.

(3)(i) For purposes of this section, "other charges assessed the student by the institution" include, but are not limited to, charges for any equipment (including books and supplies) issued by an institution to the student if the institution specifies in the enrollment agreement a separate charge for equipment that the student actually obtains or if the institution refers the student to a vendor operated by the institution or an entity affiliated or related to the institution.

(ii) The institution may exclude from the calculation of a Federal refund under this paragraph the documented cost to the institution of unreturnable equipment issued to the student in accordance with paragraph (d)(3)(i) of this section or of returnable equipment issued to the student in accordance with paragraph (d)(3)(i) of this section if the student does not return the equipment in good condition, allowing for reasonable wear and tear, within 20 days following the date of the student's withdrawal. For example, equipment is not considered to be returned in good condition and, therefore, is unreturnable, if the equipment cannot be reused because of clearly recognized health and sanitary reasons. The institution must clearly and conspicuously disclose in the enrollment agreement any restrictions on the return of equipment, including equipment that is unreturnable. The institution must notify the student in writing prior to enrollment that return of the specific equipment involved will be required within 20 days of the student's withdrawal.

(iii) An institution may not delay its payment of the portion of a refund allocable under this section to a Title IV, HEA program or a lender under 34 CFR 682.607 by reason of the process for return of equipment prescribed in paragraph (c)(3) of this section.

(4) For purposes of this section—

(i) "Room" charges do not include charges that are passed through the institution from an entity that is not under the control of, related to, or affiliated with the institution; and

(ii) "Other charges assessed the student by the institution" do not include fees for group health insurance, if this insurance is required for all students and the purchased coverage remains in effect for the student throughout the period for which the student was charged.

(e) *Period of enrollment for which the student has been charged.* (1) For purposes of this section, "the period of enrollment for which the student has been charged," means the actual period for which an institution charges a student, except that the minimum period must be—

(i) In the case of an educational program that is measured in credit hours or clock hours and uses semesters, trimesters, quarters, or other academic terms, the semester, trimester, quarter or other academic term; or

(ii) In the case of an educational program that is measured in credit hours or clock hours and does not use semesters, trimesters, quarters, or other academic terms and is—

(A) Longer than or equal to the academic year in length, the greater of the payment period or one-half of the academic year;

(B) Shorter than the academic year in length, the length of the educational program.

(2) If an institution charges by different periods for different charges, the "period of enrollment for which the student has been charged" for purposes of this section is the longest period for which the student is charged. The institution must include any charges assessed the student for the period of enrollment or any portion of that period of enrollment when calculating the refund.

(f) *Overpayments.* (1) An institution shall determine whether a student has received an overpayment for noninstitutional costs for the period of enrollment for which the student has been charged if—

(i) The student officially withdraws, drops out, or is expelled, on or after his

or her first day of class of that period; and

(ii) The student received Title IV, HEA program assistance other than from the FWS, Federal Stafford loan, Federal PLUS, Federal SLS, Federal Direct Stafford, or Federal Direct PLUS Program for that period.

(2)(i) To determine if the student owes an overpayment, the institution shall subtract the noninstitutional costs that the student incurred for that portion of the period of enrollment for which the student has been charged from the amount of all assistance (other than from the FWS, Federal Stafford Loan, Federal PLUS, Federal SLS Program, Federal Direct Stafford, or Federal Direct PLUS) that the institution disbursed to the student.

(ii) Noninstitutional costs may include, but are not limited to, room and board for which the student does not contract with the institution, books, supplies, transportation, and miscellaneous expenses.

(g) *Repayments to Title IV, HEA programs of institutional refunds and overpayments.* (1)(i) An institution shall return a portion of the refund calculated in accordance with paragraph (b) of this section to the Title IV, HEA programs if the student to whom the refund is owed received assistance under any Title IV, HEA program other than the FWS Program.

(ii) The portion of the refund that an institution shall return to the Title IV, HEA programs may not exceed the amount of assistance that the student received under the Title IV, HEA programs other than under the FWS Program for the period of enrollment for which the student has been charged.

(2) For purposes of this section, for all refund calculations other than the pro rata refund calculation required under paragraph (b)(1)(iii) of this section—

(i) An institutional refund means the amount paid for institutional charges for the period of enrollment for which the student has been charged minus the amount that the institution may retain under paragraph (g)(2)(iii) of this section for the portion of the period of enrollment for which the student has been charged that the student was actually enrolled at the institution;

(ii) An institution may not include any unpaid amount of a scheduled cash payment in determining the amount that the institution may retain for institutional charges. A scheduled cash payment is the amount of institutional charges that has not been paid by financial aid for the period of enrollment for which the student has been charged, exclusive of—

(A) Any amount scheduled to be paid by Title IV, HEA program assistance that the student has been awarded that is payable to the student even though the student has withdrawn;

(B) Late disbursements of loans made under the Federal Stafford, Federal SLS, and Federal PLUS programs in accordance with 34 CFR 682.207(d), and allowable late disbursements of unsubsidized Federal Stafford loans and loans made under the Federal Direct Student Loan Program in accordance with 34 CFR 685.303(d); and

(C) Late disbursements of State student financial assistance, for which the student is still eligible in spite of having withdrawn, made in accordance with the applicable State's written late disbursement policies. The late disbursement must be made within 60 days after the student's date of withdrawal, as defined in paragraph (j)(1) of this section, or the institution must—

(*1*) Recalculate the refund in accordance with this section, including recalculating the student's unpaid charges in accordance with this paragraph without consideration of the State late disbursement amount; and

(*2*) Return any additional refund amounts due as a result of the recalculation in accordance with paragraph (h) of this section;

(iii) In determining the amount that the institution may retain for the portion of the period of enrollment for which the student has been charged during which the student was actually enrolled, an institution shall—

(A) Compute the unpaid amount of a scheduled cash payment by subtracting the amount paid by the student for that period of enrollment for which the student has been charged from the scheduled cash payment for the period of enrollment for which the student has been charged; and

(B) Subtract the unpaid amount of the scheduled cash payment from the amount that may be retained by the institution according to the institution's refund policy; and

(iv) An institution shall return the total amount of Title IV, HEA program assistance (other than amounts received from the FWS Program) paid for institutional charges for the period of enrollment for which the student has been charged if the unpaid amount of the student's scheduled cash payment is greater than or equal to the amount that may be retained by the institution under the institution's refund policy.

(3)(i) A student must repay to the institution or to the Title IV, HEA programs a portion of the overpayment as determined according to paragraph (f) of this section. The institution shall make every reasonable effort to contact the student and recover the overpayment in accordance with program regulations (34 CFR parts 673, 674, 675, 676, 690, and 691).

(ii) The portion of the overpayment that the student or the institution (if the institution recovers the overpayment) shall return to the Title IV, HEA programs may not exceed the amount of assistance received under the Title IV, HEA programs other than the FWS, Federal Stafford Loan, Federal PLUS, Federal SLS, Federal Direct Stafford, or Federal Direct PLUS Program for the period of enrollment for which the student has been charged.

(iii) Unless otherwise provided for in applicable program regulations—

(A) If the amount of the overpayment is less than $100, the student is considered not to owe an overpayment, and the institution is not required to contact the student or recover the overpayment; and

(B) If an institution demonstrates that the total amount of a refund would be $25 or less, the institution is not required to pay the refund, provided that the institution has obtained written authorization from the student in the enrollment agreement to retain any amount of the refund that would be allocated to the Title IV, HEA loan programs.

(h) *Allocation of refunds and overpayments.* (1) Except as provided in paragraph (h)(2) of this section, if a student who received Title IV, HEA program assistance (other than assistance under the FWS Program) is owed a refund calculated in accordance with paragraph (b) of this section, or if a student who received Title IV, HEA program assistance (other than assistance under the FWS, Federal Stafford Loan, Federal PLUS, Federal SLS, Federal Direct Stafford, or Federal Direct PLUS Program) must repay an overpayment calculated in accordance with paragraph (f) of this section, an institution shall allocate that refund and any overpayment collected from the student in the following order:

(i) To eliminate outstanding balances on Federal SLS loans received by the student for the period of enrollment for which he or she was charged.

(ii) To eliminate outstanding balances on unsubsidized Federal Stafford loans received by the student for the period of enrollment for which he or she was charged.

(iii) To eliminate outstanding balances on subsidized Federal Stafford loans received by the student for the period of enrollment for which he or she was charged.

(iv) To eliminate outstanding balances on Federal PLUS loans received on behalf of the student for the period of enrollment for which he or she was charged.

(v) To eliminate outstanding balances on unsubsidized Federal Direct Stafford loans received by the student for the period of enrollment for which he or she was charged.

(vi) To eliminate outstanding balances on subsidized Federal Direct Stafford loans received by the student for the period of enrollment for which he or she was charged.

(vii) To eliminate outstanding balances on Federal Direct PLUS loans received on behalf of the student for the period of enrollment for which he or she was charged.

(viii) To eliminate outstanding balances on Federal Perkins loans received by the student for the period of enrollment for which he or she was charged.

(ix) To eliminate any amount of Federal Pell Grants awarded to the student for the period of enrollment for which he or she was charged.

(x) To eliminate any amount of Federal SEOG Program aid awarded to the student for the period of enrollment for which he or she was charged.

(xi) To eliminate any amount of other assistance awarded to the student under programs authorized by Title IV of the HEA for the period of enrollment for which he or she was charged.

(xii) To repay required refunds of other Federal, State, private, or institutional student financial assistance received by the student.

(xiii) To the student.

(2) The institution must apply the allocation policy described in paragraph (h)(1) of this section consistently to all students who have received Title IV, HEA program assistance and must conform that policy to the following:

(i) No amount of the refund or of the overpayment may be allocated to the FWS Program.

(ii) No amount of overpayment may be allocated to the Federal Stafford Loan, Federal PLUS, Federal SLS, Federal Direct Stafford Loan or Federal Direct PLUS Program.

(iii) The amount of the Title IV, HEA program portion of the refund allocated to the Federal Stafford Loan, Federal PLUS, Federal SLS programs must be returned to the appropriate borrower's lender by the institution in accordance with program regulations (34 CFR part 682).

(iv) The amount of the Title IV, HEA program portion of the refund allocated to the Title IV, HEA programs other than the FWS, Federal Stafford Loan, Federal PLUS, and Federal SLS programs must be returned to the appropriate program account or accounts by the institution within 30 days of the date that the student officially withdraws, is expelled, or the institution determines that a student has unofficially withdrawn.

(v) The amount of the Title IV, HEA program portion of the overpayment allocated to the Title IV, HEA programs other than the FWS, Federal Stafford Loan, Federal PLUS, Federal SLS, Federal Direct Stafford, and Federal Direct PLUS programs must be returned to the appropriate program account or accounts within 30 days of the date that the student repays the overpayment.

(i) *Financial aid.* For purposes of this section "financial aid" is assistance that a student has been or will be awarded (including Federal PLUS loans and Federal Direct PLUS loans received on the student's behalf) from Federal; State; institutional; or other scholarship, grant, or loan programs.

(j) *Refund dates.* (1) *Withdrawal date.* (i) Except as provided in paragraph (j)(1)(ii) and (iii) of this section, a student's withdrawal date is the earlier of—

(A) The date that the student notifies an institution of the student's withdrawal, or the date of withdrawal specified by the student, whichever is later; or

(B) If the student drops out of the institution without notifying the institution (does not withdraw officially), the last recorded date of class attendance by the student, as documented by the institution.

(ii) If the student does not return to the institution at the expiration of an approved leave of absence under paragraph (j)(2) of this section, or takes a leave of absence that is not approved under paragraph (j)(2) of this section, the student's withdrawal date is the last recorded date of class attendance by the student, as documented by the institution.

(iii) If the student is enrolled in an educational program that consists predominantly of correspondence courses, the student's withdrawal date is normally the date of the last lesson submitted by the student, if the student failed to submit the subsequent lesson in accordance with the schedule for lessons established by the institution. However, if the student establishes in writing, within 60 days of the date of the last lesson that he or she submitted, a desire to continue in the program and an understanding that the required lessons must be submitted on time, the institution may restore that student to "in school" status for purposes of funds received under the Title IV, HEA programs. The institution may not grant the student more than one restoration to "in school" status on this basis.

(2) *Approved leave of absence.* A student who has been granted a leave of absence by an institution is not considered to have withdrawn from the institution and is considered to be on an "approved leave of absence" for purposes of this section (and, for a Title IV, HEA program loan borrower, for purposes of terminating the student's in-school status) under the following conditions—

(i) In any twelve-month period, the institution may grant a single leave of absence to a student, not to exceed 60 days;

(ii) The student must make a written request to be granted a leave of absence; and

(iii) The leave of absence may not involve additional charges by the institution to the student.

(3) *Timely determination of withdrawal for students who drop out.* An institution must determine the withdrawal date for a student who drops out within 30 days after the expiration of the earlier of the—

(i) Period of enrollment for which the student has been charged;

(ii) Academic year in which the student withdrew;

(iii) Educational program from which the student withdrew

(4) *Timely payment.* An institution shall pay a refund that is due to a student—

(i) If a student officially withdraws or is expelled, within 30 days after the student's withdrawal date;

(ii) If a student drops out, within 30 days of the earliest of the—

(A) Date on which the institution determines that the student dropped out;

(B) Expiration of the academic term in which the student withdrew; or

(C) Expiration of the period of enrollment for which the student has been charged;

(iii) If a student—

(A) Does not return to the institution at the expiration of an approved leave of absence under paragraph (j)(2) of this section, within 30 days of the earlier of the date of expiration of the leave of absence or the date the student notifies the institution that the student will not be returning to the institution after the expiration of an approved leave of absence; (B) Is taking a leave of absence that is not approved under paragraph (j)(2) of this section, within 30 days after the last recorded date of class attendance by the student, as documented by the institution.

(Authority: 20 U.S.C. 1091b, 1092, 1094)

12. Section 668.23 is revised to read as follows:

§668.23 Audits, records, and examinations.

(a) An institution that participates in the Federal Perkins Loan, FWS, FSEOG, Federal Stafford Loan, Federal PLUS, Federal Pell Grant, PAS, or FDSL Program shall comply with the regulations for that program concerning—

(1) Fiscal and accounting systems;

(2) Program and fiscal recordkeeping; and

(3) Record retention.

(b)(1) An institution that participates in any Title IV, HEA program shall cooperate with an independent auditor, the Secretary, the Department of Education's Inspector General, the Comptroller General of the United States, or their authorized representatives, a guaranty agency in whose program the institution participates, the appropriate nationally recognized accrediting agency, and the appropriate State postsecondary review entity designated under 34 CFR part 667, in the conduct of audits, investigations, and program reviews authorized by law.

(2) A third-party servicer shall cooperate with an independent auditor, the Secretary, the Department of Education's Inspector General, and the Comptroller General of the United States, or their authorized representatives, a guaranty agency in whose program the institution contracting with the servicer participates, the appropriate nationally recognized accrediting agency of an institution with which the servicer contracts, and the State postsecondary review entity designated under 34 CFR part 667, in the conduct of audits, investigations, and program reviews authorized by law.

(3) The institution's or servicer's cooperation must include—

(i) Providing timely access, for examination and copying, to the records (including computerized records) required by the applicable regulations and to any other pertinent books, documents, papers, computer programs, and records;

(ii) Providing reasonable access to personnel associated with the institution's or servicer's administration of the Title IV, HEA programs for the purpose of obtaining relevant information. In providing reasonable access, the institution or servicer shall not—

(A) Refuse to supply any relevant information;

(B) Refuse to permit interviews with those personnel that do not include the presence of the institution's or servicer's management; and

(C) Refuse to permit interviews with those personnel that are not tape recorded by the institution or servicer.

(c)(1)(i) An institution that participates in the FDSL, Federal Perkins Loan, FWS, FSEOG, Federal Stafford Loan, Federal PLUS, Federal SLS, Federal Pell Grant, or PAS Program shall have performed at least annually a compliance audit of its Title IV, HEA programs.

(ii) A third-party servicer shall have performed at least annually a compliance audit that meets the compliance audit standards for institutions of the servicer's administration of the participation in the Title IV, HEA programs of each institution with which the servicer has a contract, unless—

(A) The servicer contracts with only one participating institution; and

(B) The audit of that institution's participation involves every aspect of the servicer's administration of that Title IV, HEA program.

(iii) To meet the requirements of paragraph (c)(1)(ii) of this section, a third-party servicer that contracts with more than one participating institution may submit a single compliance audit report that meets the compliance audit standards for institutions and that covers the servicer's administration of the participation in the Title IV, HEA programs of each institution with which the servicer contracts.

(iv) The audit required under paragraph (c)(1) (i) or (ii) of this section shall be conducted by an independent auditor in accordance with the general standards and the standards for compliance audits in the U.S. General Accounting Office's (GAO's) *Government Auditing Standards*. (This publication is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.)

(2)(i)(A) The institution's first audit must cover the institution's activities for the entire period of time since the institution began to participate in the Title IV, HEA programs. Each subsequent audit must cover the institution's activities for the entire period of time since the preceding audit.

(B) A foreign institution's first audit must cover the foreign institution's activities for the two most recently concluded award years in which the foreign institution has participated in the Title IV, HEA programs, unless otherwise specified by the Secretary. A foreign institution that has participated in the Title IV, HEA programs for less than two years must have performed an audit that covers the entire period of time since the foreign institution began to participate in the Title IV, HEA programs. Each subsequent audit must cover the foreign institution's activities for the entire period of time since the preceding audit.

(ii) The third-party servicer's first audit must cover the servicer's activities for the award year, ending on or after July 1, 1994, in which the servicer began to administer any aspect of an institution's participation in the Title IV, HEA programs. Each subsequent audit that the servicer has performed must cover the servicer's activities for the entire period of time since the servicer's preceding audit.

(3) The institution or servicer, as applicable, shall submit its audit report to the Department of Education within six months of the end of the institution's or servicer's fiscal year ending on or after the most recently concluded award year for which the audit is performed or, if applicable, in accordance with deadlines established in—

(i) The Single Audit Act;

(ii) Office of Management and Budget Circular A–133, "Audits of Institutions of Higher Education and Other Nonprofit Organizations;" or

(iii) Office of Management and Budget Circular A–128, "Audits of State and Local Governments."

(4) The Secretary may require the institution or servicer to provide, upon request, to cognizant guaranty agencies and eligible lenders under the FFEL programs, State agencies, the Secretary of Veterans Affairs, nationally recognized accrediting agencies, and State postsecondary review entities designated under 34 CFR part 667, the results of any audit conducted under this section.

(d) Procedures for audits are contained in audit guides developed by, and available from, the Department of Education's Office of Inspector General. These audit guides do not impose any requirements beyond those imposed under applicable statutes and regulations and GAO's *Government Auditing Standards*. (This publication is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.)

(e)(1) An institution or a third-party servicer that has an audit conducted in accordance with this section shall—

(i) Give the Secretary and the Inspector General access to records or other documents necessary to review the audit; and

(ii) Include in any arrangement with an individual or firm conducting an

audit described in this section a requirement that the individual or firm shall give the Secretary and the Inspector General access to records or other documents necessary to review the audit.

(2) A third-party servicer shall give the Secretary and the Inspector General access to records or other documents necessary to review an institution's audit.

(3) An institution shall give the Secretary and the Inspector General access to records or other documents necessary to review a third-party servicer's audit.

(f) The Secretary considers the audit requirement in paragraph (c) of this section to be satisfied by an audit conducted in accordance with—

(1) The Single Audit Act (Chapter 75 of title 31, United States Code);

(2) Office of Management and Budget Circular A–133, "Audits of Institutions of Higher Education and Other Nonprofit Organizations;" or

(3) Office of Management and Budget Circular A–128, "Audits of State and Local Governments."

(g) Upon written request, an institution or a third-party servicer shall give the Secretary access to all Title IV, HEA program and fiscal records, including records reflecting transactions with any financial institution with which the institution or servicer deposits or has deposited any Title IV, HEA program funds.

(h)(1) In addition to the records required under the applicable program regulations and this part, for each recipient of Title IV, HEA program assistance, the institution shall establish and maintain, on a current basis, records regarding—

(i) The student's admission to, and enrollment status at, the institution;

(ii) The educational program and courses in which the student is enrolled;

(iii) Whether the student is maintaining satisfactory progress in his or her educational program;

(iv) Any refunds due or paid to the student, the Title IV, HEA program or accounts, and the student's lender under the Federal Stafford Loan, Federal PLUS, and Federal SLS programs;

(v) The student's prior receipt of financial aid (see § 668.19);

(vi) The verification of student aid application data; and

(vii) Financial and other institutional records necessary to determine the institutional eligibility, financial responsibility, and administrative capability of the institution; and

(2) An institution shall establish and maintain records regarding the admission requirements and educational qualifications of each regular student enrolled in any eligible program offered by the institution, whether the student received Title IV, HEA program assistance or not.

(3) Records required under applicable program regulations and this part shall be—

(i) Systematically organized;

(ii) Readily available for review by the Secretary at the geographical location where the student will receive his or her degree or certificate of program or course completion; and

(iii) Retained by the institution for the longer of at least five years from the time the record is established or the period of time required under the applicable program regulations or this part.

(Authority: 20 U.S.C. 1088, 1094, 1099c, 1141 and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109)

13. Section 668.81 is amended by adding paragraph (e) and revising the authority citation to read as follows:

§ 668.81 Scope and special definitions.

* * * * *

(e) This subpart does not apply to the termination of the eligibility of an institution to participate in the Title IV, HEA programs if that termination results from the Secretary's receipt of a notice from a State postsecondary review entity under 34 CFR part 667 that indicates the SPRE has determined that the institution should not be eligible to participate in those programs.

(Authority: 20 U.S.C. 1094 and 1099a–3(h))

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14. Section 668.116 is amended by revising paragraph (e)(1)(vi) to read as follows:

§ 668.116 Hearing.

* * * * *

(e)(1) * * *

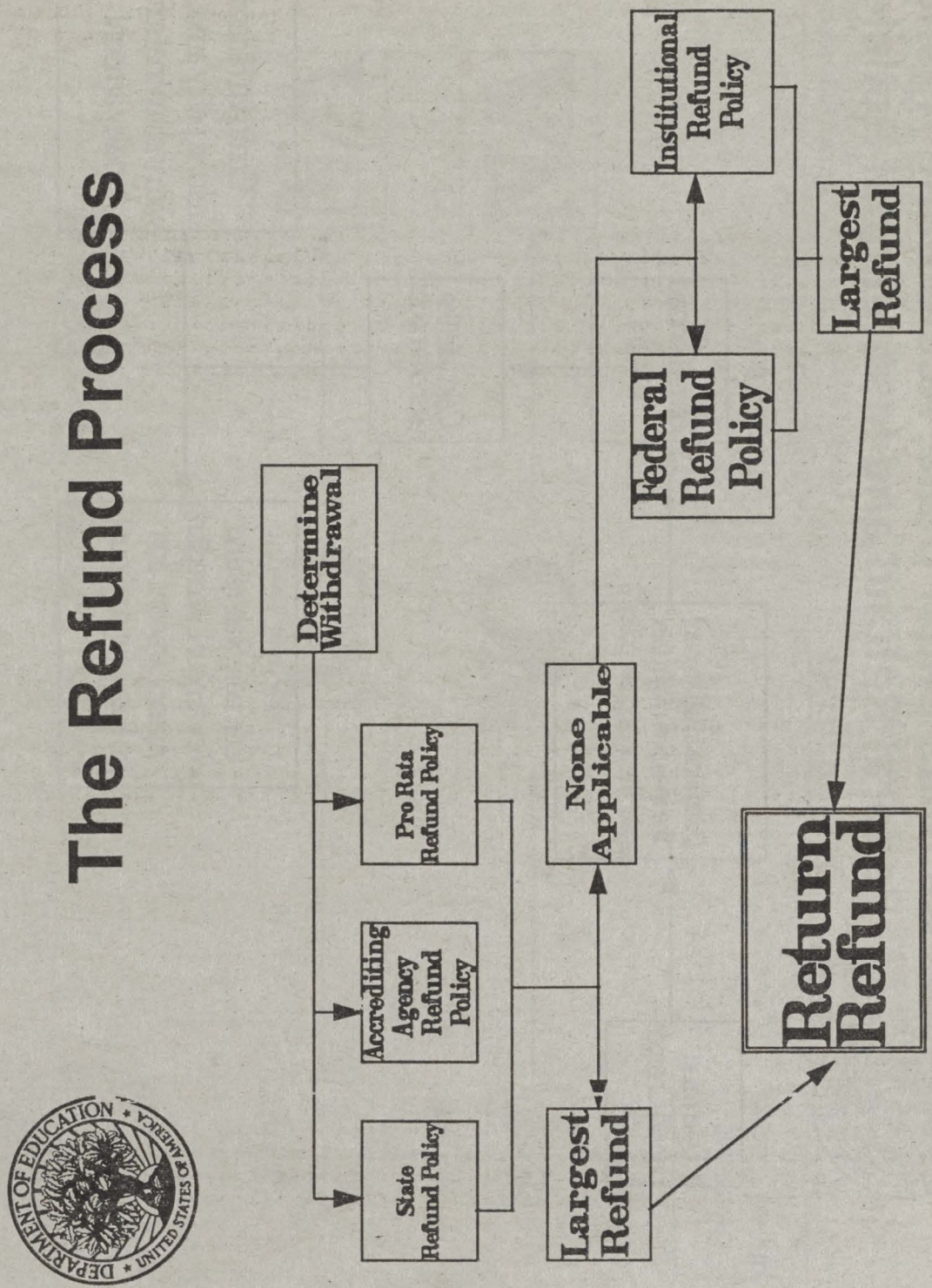
(vi) Other Department of Education records and materials if the records and materials were provided to the hearing official no later than 30 days after the institution's or servicer's filing of its request for review.

* * * * *

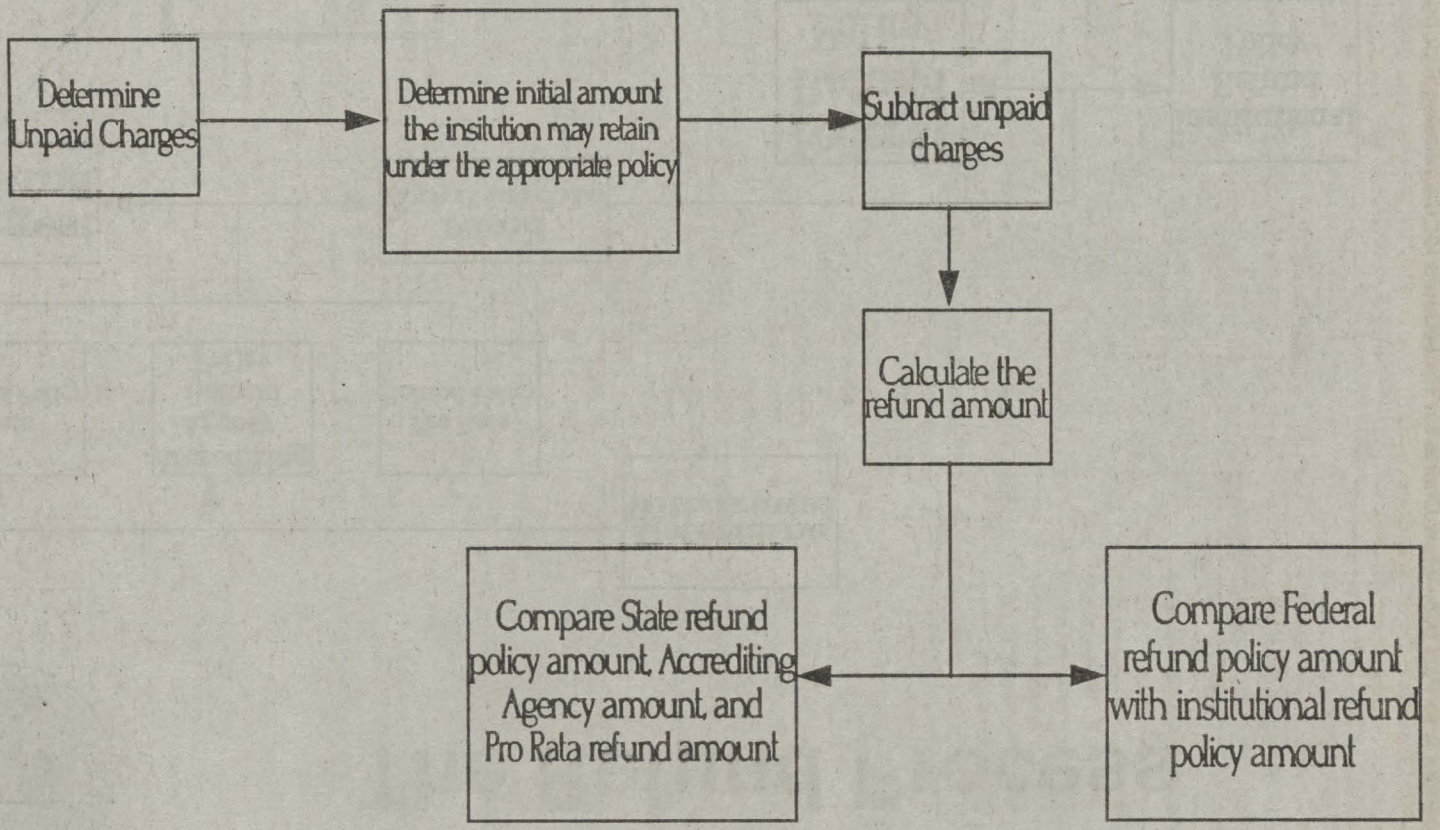
15. Appendix A to Part 668 is revised to read as follows:

BILLING CODE 4000–01–P

Appendix A to Part 668—Flow Charts for Procedures for Calculating Refunds Under § 668.22



Refunds under State, Accrediting Agency, Federal Refund and Institutional Policies



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PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAMS

16. The authority citation for Part 682 continues to read as follows:

Authority: 20 U.S.C. 1071 to 1087–2, unless otherwise noted.

17. Section 682.413 is amended by revising paragraph (e)(1) to read as follows:

§ 682.413 Remedial actions.

* * * * *

(e)(1) The Secretary's decision to require repayment of funds, withhold funds, or to limit, suspend, or terminate a lender, agency, or third-party servicer from participation in the FFEL programs does not become final until the Secretary provides the lender, agency, or servicer with written notice of the intended action and an opportunity to be heard thereon, at a time and in a manner the Secretary determines to be appropriate to the resolution of the issues on which the lender, agency, or servicer requests an opportunity to be heard.

* * * * *

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